

**PROTECTING INDIGENOUS KNOWLEDGE UNDER
INTERNATIONAL LAW**

A Thesis Submitted to the College of Graduate Studies and
Research in Partial Fulfillment of the Requirements for the Degree
of
Master of Laws in the College of Law
University of Saskatchewan
Saskatoon

By
Blanche Cathleen Cowley-Head

November 2002

© Copyright Blanche Cowley-Head, 2002. All rights reserved.

PERMISSION TO USE

In presenting this thesis in partial fulfilment of the requirements for a Postgraduate degree from the University of Saskatchewan, I agree that the Libraries of this University may make it freely available for inspection. I further agree that permission for copying of this thesis in any manner, in whole or in part, for scholarly purposes may be granted by the professor or professors who supervised my thesis work or, in their absence, by the Head of the Department or the Dean of the College in which my thesis work was done. It is understood that any copying or publication or use of this thesis or parts thereof for financial gain shall not be allowed without my written permission. It is also understood that due recognition shall be given to me and to the University of Saskatchewan in any scholarly use which may be made of any material in my thesis.

Requests for permission to copy or to make other use of material in this thesis in whole or part should be addressed to:

Head of the Department of College of Graduate Studies and Research
University of Saskatchewan
Saskatoon, Saskatchewan (S7N 5A4)

ABSTRACT

Indigenous peoples are facing immense and immediate external pressures that are threatening their continued cultural survival. Chapters 1 and 2 detail the issues and concerns of indigenous peoples with respect to the past and current threats on their heritages and knowledge that stem from centuries of colonialism.

This thesis argues that the most promising source of external protection of the distinctive indigenous cultural heritages and knowledge is international human rights law. It is argued that human rights law is the area of international law that is most receptive to indigenous peoples' legal status and concerns and has the most potential for protecting the integrity of indigenous heritages and knowledge in a manner that is compatible with indigenous conceptual frameworks and values.

Others areas of international law, such as environment, trade, intellectual property and cultural property are also assessed in Chapter 3 as potential sources of external protection. Chapter 4 outlines indigenous principles of measuring all potential sources of external legal protection against internal decolonization goals and aspirations for protecting indigenous heritages and knowledge.

ACKNOWLEDGEMENTS

There are many people who made the writing of this thesis possible.

I thank my committee members Ruth Thompson, Norm Zlotkin and Martin Phillipson of the University of Saskatchewan College of Law for their patient reviews of my various drafts and their insightful comments and suggestions for revisions. Special thanks goes out to my thesis supervisor Ruth Thompson for her brilliant and patient guidance.

I thank Opaswayak Educational Authority for funding assistance of my graduate studies; as well as Dean Rask and Ron Pearson for providing office space and moral support during the “gestation” stage of my thesis.

I honour my family and home community as the sources of my indigenous knowledge and heritage.

DEDICATION

TO ALL MY RELATIONS...

LOOKING BACK...

My Ancestors
My Grandparents
My Parents, Albert and Mary Cowley

LOOKING BESIDE ME...

My husband, Dean B. Head (Left Tracks on the Ridge)
My brothers and sisters

LOOKING FORWARD...

My sons, John-Dean (The One Who Wears a Leather Strap on His Head)
and Jackson (Friendly One)
My nieces and nephews
My grandchildren
My great grandchildren

...BLANCHE COWLEY-HEAD (TRAVELLING WOMAN)

TABLE OF CONTENTS

PERMISSION TO USE.....	i
ABSTRACT.....	ii
ACKNOWLEDGEMENTS.....	iii
DEDICATION.....	iv
TABLE OF CONTENTS.....	v
1. INTRODUCTION.....	1
2. STATEMENT OF ISSUES FOR INDIGENOUS PEOPLES	5
2.1 Who are Indigenous Peoples? Where are Indigenous Peoples?... 5	
2.2 Related Themes of Dispossession under Colonizing Paradigm. 10	
2.2.1 Natural Resources	12
2.2.2 Cultural Heritage.....	16
2.2.3 Indigenous Knowledge	27
2.2.4 Legal Status	30
2.2.5 Lands and Territories.....	31
2.3 Indigenous Responses to Dispossession.....	35
3. SUMMARY OF INTERNATIONAL PROTECTION OF INDIGENOUS PEOPLES AND THEIR CULTURAL HERITAGE AND KNOWLEDGE	37
3.1 Introduction.....	37
3.2 Political Recognition of Indigenous Peoples and Their Concerns Within the International Context	39
3.3 Legal Recognition of Indigenous Peoples' Status and Concerns Under International Human Rights Law.....	49
3.3.1 Human Right to External Forms of Self-Determination..	50
3.3.2 Human Right to Internal Forms of Self-Determination...	54
3.3.3 Self-determination Right to Protect Cultural Heritage and Knowledge.....	72
3.4 Legal Recognition of Indigenous Heritage and Knowledge Under Other Areas of International Law	91
3.4.1 International Environmental Law.....	91
3.4.2 International Trade Law	107
3.4.3 International Intellectual Property Law.....	124

3.4.4	International Cultural Property Law.....	140
4.	CONCLUSIONS	151
4.1	Indigenous heritage and knowledge are the sources of distinct Indigenous identity	152
4.2	Indigenous heritage and knowledge are a reflection of a particular approach to reality and are reflected in indigenous languages	153
4.3	The first and fundamental strategy of protecting indigenous heritage and knowledge is integral to indigenous peoples	155
4.4	External strategies of protecting indigenous heritage and knowledge must take a holistic approach	156
4.5	Of the external strategies available under international law, human rights law offers the most potential for constructing a holistic approach to protecting indigenous heritage and knowledge	158
4.6	The remaining external options available under international law offer, at best, fragmented approaches for protecting indigenous heritage and knowledge	161
4.7	Indigenous heritage and knowledge must be respected and protected under post-colonial framework of international law if they are to be shared on an equitable basis with all the peoples of the world.....	169
	REFERENCES	172
	APPENDICES	193
	Statements, declarations, charters, resolutions and recommendations by organizations representing indigenous and local communities and by other organizations	

1. INTRODUCTION

For more than five hundred years, indigenous peoples endured the oppressive treatment of colonizer nations that systematically dispossessed them of everything of value to them as peoples: of access to the natural resources to which they had long been in relationship, of their knowledge and heritage, of their lands and territories and of their status as self-determining peoples. The central defining feature of the experience of colonialism for indigenous people has been dispossession. The legacy of dispossession for at least 300 million indigenous peoples around the world is that it has left them among the poorest and most disadvantaged peoples in the world.¹

¹ UN, *Study of the problem of discrimination against indigenous populations, Volume V Conclusions, Proposals and Recommendations* – Final report submitted by the Special Rapporteur, Mr. Jose R. Martinez Cobo (New York: United Nations, 1987) at 1 [hereinafter *Cobo Study*]; WIPO, *Roundtable on Intellectual Property and Indigenous Peoples - Initiatives for Protection of Rights of Holders of Traditional Knowledge, Indigenous Peoples and Local Communities*, Doc. Prepared by Mr. Lars Anders Baer, Vice President, SAAMI Council, Jokkmokk, Sweden, WIPO/INDIP/RT/98/4A, 13 July 1998, at 1, online: WIPO <http://www.wipo.org/news/en/index.html?wipo_content_frame=/news/en/documents.html> (date accessed: 15 February 2002).

Indigenous peoples have lived through four major eras of European colonization.² It appears that a fifth era of colonization is under way as indigenous peoples cope with appropriation of their molecular essences, their knowledge of molecular essences and processes of all life forms, and other forms of appropriation of their many elements of their knowledge and heritage. Indigenous peoples are facing increasing external pressures and demands from governments, organizations and corporations because they are perceived as potential sources of solutions for global issues related to restoring the earth's ecological balance³ and for resourcing a shifting world economic base⁴.

Particularly since the launching of the international decolonization movement, indigenous peoples have been engaged in internal processes of decolonization focused on rediscovering and recovering their knowledge and

² The first era took place between the twelfth and seventeenth centuries. The second era drew to a close during the 1820s. The third era occurred during the nineteenth century, and the fourth era took place during the twentieth century. See further discussion in text accompanying *infra*, Chapter 2, note 17.

³ The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) [hereinafter *Our Common Future*] at 2.

⁴ M.G. Smith, ed., *Global Rivalry & Intellectual Property – Developing Canadian Strategies* (Halifax, NS: The Institute for Research on Public Policy, 1991) at 59; For discussion on changing world economic order see *infra*, Chapter 3, note 196 and accompanying text.

heritage.⁵ Their internal processes are heightened by the awareness of needing to take external action in order to protect their continued survival and well-being in the face of immense external pressures on their knowledge and heritage.⁶

Indigenous peoples have often had little or no protection from the actions of the colonizer nations that settled on their ancestral territories and lands. Indigenous peoples' experiences with domestic legal systems were that the latter systems were not conducive to upholding indigenous interests over their own interests. As part of their strategies of achieving external protections, many indigenous representatives and groups chose to explore avenues of protection available under international law.

This thesis focuses on indigenous peoples' strategy of exploring external sources of protection of their knowledge and heritage such as those found under international law. Part I of this thesis introduces the issues faced by indigenous peoples with respect to the historical and continuing effects of colonialism upon indigenous knowledge and heritage. The rationale for

⁵ See collection of essays by indigenous scholars in M. Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

⁶ Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001) at para. 12, online: UN <<http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>> (date accessed: 15 February 2002) [hereinafter *Indigenous relationship to land study*].

indigenous strategies of seeking external protections such as under international law is introduced and the content of this thesis is briefly outlined.

Part II of this thesis locates and describes indigenous peoples as geographically and culturally diverse groups. The cultural heritage issues and concerns of indigenous peoples throughout the world are illustrated under the framework of colonialism. Recourse to public international law as a primary indigenous strategy for political and legal protection of their cultural heritage is introduced and explained.

Part III reviews the role of international human rights law in protecting indigenous peoples' human right to determine their own lives and destinies, a right that includes controlling and protecting the bodies of indigenous knowledge that form the bases of their identities as distinct peoples. While initiatives under international human rights law are the primary focus, other areas of international law are also reviewed as potential sources of legal recognition and protection for indigenous heritage and knowledge.

Part IV concludes by examining the role and effectiveness of protecting indigenous knowledge and heritage through external strategies such as under international law. The role of international law is reviewed in terms of meeting indigenous decolonization goals and aspirations.

2. STATEMENT OF ISSUES FOR INDIGENOUS PEOPLES

2.1 Who are Indigenous Peoples? Where are Indigenous Peoples?

The first task is to identify “Who are indigenous peoples?” Indigenous peoples have adopted the English adjective “indigenous” to specify their identity as peoples in a colonial-based language. “Indigenous” locates identity in contradistinction to the reference group of other peoples (ie. colonial) and refers to the status of indigenous peoples as original peoples occupying lands and territories prior to the arrival of colonial peoples.¹ One indigenous legal scholar succinctly states “they are the descendants of peoples occupying a territory when the colonizers arrived.”² The term also locates identity in contradistinction to the reference point of the environment:

¹ A. G. Kouevi, “The Right to Self-Determination of Indigenous Peoples: Natural or Granted? An African Perspective” in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000) at 24-25. This section relies on indigenous political definitions of their identity. See *infra*, Chapters 3.2 & 3.3.2 for discussion of legal interpretations of “peoples” and “indigenous peoples” in international human rights law.

² S. Venne, *Our Elders Understand Our Rights – Evolving International Law Regarding Indigenous Peoples* (Penticton: Theytus Books, 1998) at 88.

“indigenous” reflects the symbiotic nature of the relationship between indigenous peoples and their lands and territories.³

Contemporary academic sources enumerate at least 300 million indigenous peoples living within some 5,290 political or social groupings.⁴ These groupings or nations of indigenous peoples speak from 4,000 to 5,000 different languages⁵ and each has their own term in their own language by which they identify themselves.

Indigenous peoples reside in over 70 countries on all five continents. Fourmile estimates the global geographic distribution of indigenous peoples as:

- 150 million in Asia – including more than 67 million in China, 50 million in India and 6.5 million in the Philippines;

³ Henderson illustrates the symbiotic nature when he writes: “...the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource...Their vision is of different realms enfolded into a sacred space...It is fundamental to their identity, personality and humanity...[the] notion of self does not end with their flesh, but continues with the reach of their senses into the land.” J.S. Henderson, “Mikmaq Tenure in Atlantic Canada” (1995) 18:2 *Dalhousie Law Journal* 196.

⁴ R.K. Hitchcock, “International Human Rights, the Environment, and Indigenous Peoples” in *Endangered Peoples – Indigenous Rights and the Environment* (Niwot, CO: University Press of Colorado, Colorado Journal of International Environmental Law and Politics, 1994) at 3.

⁵ D.A. Posey, “The ‘Balance Sheet’ and the ‘Sacred Balance:’ Valuing the Knowledge of Indigenous and Traditional Peoples” (Protecting Knowledge – Traditional Resource Rights in the New Millennium, Vancouver, British Columbia, Canada, 23 –26 February, 2000), online: Union of BC Indian Chiefs <<http://www.ubcic.bc.ca/protect.htm>> (date accessed: 2 May 2000).

- 30 to 80 million in Latin America (the smaller number represents government figures, the larger those of indigenous leaders);
- 3 to 13 million in North America (depending on whether Chicanos and Metis are included);
- several million in Africa;
- over 8 million in the Oceanic region, including 6 million in New Guinea, 300,000 in both Australia and New Zealand, with the balance inhabiting the islands of Polynesia, Micronesia and Melanesia; and
- in the polar region, 125,000 circumpolar Inuit and 60,000 Scandinavian Saami peoples.⁶

In most countries, indigenous peoples are designated as minorities within the general population. Indigenous peoples comprise roughly only 5% of the world's total population of 6 billion people⁷. Despite their small numerical proportion, indigenous peoples constitute at the same time a significant proportion of the world's cultural diversity. For instance, as language is often the leading indicator of cultural diversity among the world's population, the fact that three-quarters of the world's 6,000⁸ languages are spoken by indigenous peoples indicates that they constitute most of the

⁶ H. Fourmile, "Indigenous Peoples, the Conservation of Traditional Ecological Knowledge, and Global Governance" in N. Low, ed., *Global ethics and environment* (New York: Routledge, 1999) at 216.

⁷ Hitchcock, *supra* note 4 at 2; UN, *World Population Prospects: The 2000 Revision* at 5, online: UN, Population Division of the Department of Economic and Social Affairs of the UN Secretariat <<http://www.un.org/esa/population/publications/wpp2000/wpp2000h.pdf>> (date accessed: 27 May 2002).

⁸ S. Wurm, ed., *Atlas of the World's Languages in Danger of Disappearing* (Paris: UNESCO Publishing, 1996) at 1.

world's cultural diversity.⁹ Fourmile indicates the scope of indigenous population and language diversity:

...They include groups as disparate as the Quechua descendants of the Inca civilization in Bolivia, Ecuador and Peru, who collectively number more than 10 million, and the Gurumalum band of Papua New Guinea, who number fewer than ten. In New Guinea alone, over six hundred languages are spoken among a population of only six million, and in India there are more than 1,600 languages (Durning, 1992).¹⁰

Indigenous peoples constitute much of the world's human diversity.

The fact that they inhabit many of the planet's areas of highest biological diversity has led to the growing belief that there is a link between human diversity and biological diversity.¹¹ Fourmile observes that:

...In the Declaration of Belem, for example, it is asserted that 'native peoples have been stewards of 99 percent of the world's genetic resources' (International Society of Ethnobiology, 1988, in Posey and Dutfield, 1996: 2). Of the nine countries which together account for 60 percent of human languages, six of these centers of cultural diversity are also biologically megadiverse countries with exceptional numbers of unique plant and animal species and high levels of endemism. In what has been dubbed the 'Biological - 17', the nations that are home to more than two-thirds of the Earth's biological resources are also the traditional territories of most of the world's indigenous peoples (Mittermeier *et al.*, 1997).¹²

⁹ Fourmile, *supra* note 6.

¹⁰ *Ibid.*

¹¹ A. Gray, "Development Practice and Indigenous Peoples" in S. Buchi, *et al.*, eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997) at 289.

¹² Fourmile, *supra* note 6 at 216-217.

The arrival of colonial peoples had a profound effect on the human and environmental diversity of indigenous lands and territories. European colonial activities often meant death or destruction for indigenous peoples through large-scale massacres, disease or enslavement, destruction of the family unit and cultural practices, and forced relocations or removals from ancestral lands and territories.¹³ Wholesale genocidal or assimilation programmes were carried out by colonial nations for many generations.¹⁴ Despite the profound effects of centuries of colonialism upon their lands and their psyches however, indigenous peoples have persisted into contemporary times with a continuing ethos of their identity as distinct peoples.

Today, indigenous populations reside within state borders (usually as minorities) and have adapted to the economic and social systems of the colonial peoples who have settled in their territories. Despite generations of cultural genocide programmes, indigenous peoples still continue to exist, with the majority (possibly up to 85%) of indigenous peoples maintaining

¹³ Aroha Te Pareake Mead, "Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific" in L. Pihama (Te Atiawa, Ngati Mahanga) & C. Waerea-i-te-rangi Smith (Ngati Porou, Ngati Apa), eds., *Cultural and Intellectual Property Rights – Economics, Politics and Colonisation, Volume II* (Auckland, NZ: International Research Institute for Maori and Indigenous Education and Moko Productions, 1997) at 23; *Indigenous relationship to land study, supra*, Chapter 1, note 6 at para. 22.

¹⁴ R.A. Williams, Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) 660 *Duke Law Journal* at 665; Hitchcock, *supra* note 4 at 5.

“traditional” lifestyles in every continent of the globe across a diverse geographical spectrum: polar regions, deserts, savannas, forests, tropical jungles, and islands.¹⁵

Indigenous peoples continue to identify themselves as politically and culturally distinct peoples who continue to occupy and use ancestral lands and who share common language and other cultural manifestations. The challenge for indigenous peoples continues to be how to perpetuate and preserve their lives and destinies as culturally distinct peoples.

2.2 Themes of Dispossession under International Colonizing Paradigm

During centuries of colonization activities throughout the world, Europeans established political, economic and military dominance over much of the world as manifested by a world political and legal order that reflected their particular norms and values. The particular worldview that characterized European nations and how their values and beliefs consequently rationalized the use of superior military power to exercise their will upon the world were two factors that facilitated European dominance over much of the world order.¹⁶

¹⁵ Posey, *supra* note 5.

¹⁶ D. Kagan, S. Ozment & F. M. Turner, *The Western Heritage* (Upper Saddle River, NJ: Prentice Hall, 1998) at 592; *Indigenous relationship to land study, supra*, Chapter 1, note 6 at para. 29.

European colonization can be organized into four major historical eras. The first era of European colonization took place between the twelfth and seventeenth centuries and focused on "the discovery, exploration, and initial conquest and settlement of the New World."¹⁷ The second era that drew to a close during the 1820s focused on trade rivalry among the nation states of Spain, France and Great Britain. The third stage occurred during the nineteenth century and focused on European establishment and administration of colonial interests in Africa, Asia, Australia and New Zealand.¹⁸ The fourth and most recent era took place during the twentieth century where European empires began collapsing and shrinking through the decolonization movement.¹⁹ The pattern of European dominance of the world order and the nature of their expansionist activities facilitated what is now variously referred to as European "colonization," "imperialism," or "colonialism."²⁰

European arrival in indigenous lands and territories throughout the world was not necessarily orderly or predictable. Only that the fact that their

¹⁷ Kagan, *supra* note 16.

¹⁸ J.M. Blaut, *The Colonizer's Model of the World* (New York: The Guilford Press, 1993) at 22.

¹⁹ Kagan, *supra* note 16.

²⁰ Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study on the protection of the cultural and intellectual property rights of indigenous peoples*, prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1993/28 (28 July 1993) at para. 18, online: UN <<http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>> (date accessed: 15 February 2002) [hereinafter *Cultural and intellectual property study*].

arrival was inevitable at some point in time was predictable. Therefore, indigenous peoples experienced the imposition of colonialist regimes and activities at different points and in different ways during their histories as Europeans sought different things from different lands and peoples during different eras.

Whatever the focus of any particular era of European colonizing activities, colonization resulted in the same impact on indigenous lands and lives. The experience of colonization for indigenous peoples can be summed up in one word: dispossession. Dispossession meant the wholesale taking of anything that belonged to or with indigenous peoples that was considered to be of economic or other value to European nations.²¹ The profoundly invasive nature of colonialism continued unabated for centuries and persists in this form even into contemporary times.²² Indigenous experiences of dispossession tended to occur (though not necessarily strictly) in certain cycles, depending on the focus of European acquisitiveness.

2.2.1 Natural Resources

The original focus of European activities in the Americas was on the acquisition of raw wealth that was easily transportable. For instance, in Peru, Columbia and many other South American countries during the first era of

²¹ *Indigenous relationship to land study, supra*, Chapter 1, note 6 at para. 23.

²² *Cultural and intellectual property study, supra* note 20 at para. 19.

colonization, the European vision of El Dorado drove their quest for gold and later silver.²³ Blaut writes that between 1561 and 1580, the Americas supplied about 85% of the world's production of silver. He estimates that 180 tons of gold and 17,000 tons of silver were transported to Europe by 1640.²⁴

Indigenous peoples around the world subsequently experienced the ravages of extractive industries on their traditional lands and territories. For example, in Bougainville, indigenous peoples, their lands, and their relationship with their lands were almost totally destroyed by mining activities for gold and copper.²⁵ West Papua lands and territories were the focus of struggle between the United States and the Dutch for control over the rich oil deposits, petroleum and copper.²⁶ The Ogoni peoples of Nigeria had their lands and lives devastated by the oil industry.²⁷ In North America, indigenous homelands were similarly harvested of oil, coal, uranium and natural gas.²⁸

²³ M. Jackson, "The Nature of Knowing: Self-Determination, Land and the Double Helix" in Buchi, *supra* note 11 at 348.

²⁴ Blaut, *supra* note 18 at 189.

²⁵ R. Havini, "From Victims to Victors: Development Aggression and Indigenous Mobilisation" in Buchi, *supra* note 11 at 80-81.

²⁶ M. Gault-Williams, "Strangers in their Own Land" (1990) 14:4 *Cultural Survival Quarterly* at 43.

²⁷ B. Naanen, "Oil-Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People" in Buchi, *supra* note 11 at 90; The International Coordinating Committee of the (NGO) International Alliance of the Indigenous-Tribal Peoples of the Tropical Forests passed resolutions in support of the indigenous Ogoni people of Nigeria at their London meeting of December 1993: "Resolution on the Ogoni People of Nigeria" in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental*

Over time, European extractive-based industries shifted in focus from non-renewable resources to harvesting and commercially exploiting renewable resources such as timber, electricity and geothermal power.²⁹ Many groups of indigenous peoples in South America³⁰, Africa, and Asia have experienced the destruction of their rainforest habitats as a result of timber harvesting for European markets.³¹ During the twentieth century, the burgeoning energy

Agenda (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996) at 167 [hereinafter *Indigenous Peoples & Forests*].

²⁸ J. Burger, *The Gaia Atlas of First Peoples* (Toronto, ON: Anchor Books, 1990) at 47.

²⁹ Hitchcock, *supra* note 4 at 12-13.

³⁰ M. Colchester, "Indigenous Peoples and the Political Economy of Logging: The Case of Guyana and Suriname" in Buchi, *supra* note 11 at 104.

³¹ Burger, *supra* note 28 at 45; M. Gault-Williams, *supra* note 26 at 45; The "Statement to the International Alliance's Asia Regional Meeting, 31 January 1995, Baguio City, Philippines" in *Indigenous Peoples & Forests*, *supra* note 27 at 177-178 provides further Asia-specific examples about impact of development activities on indigenous forests, lands and environment:

4. In our communities we are involved in many active campaigns for the defense of our land, lives and culture:

- Dayak peoples against logging, plantations, dams, declaration and establishment of native customary land rights for permanent forest estates, protected forests and reserves, national parks and wildlife sanctuaries and resort development in Sarawak;
- Murots and Duzons of Sabah against the plantation and dam displacement;
- Kachins against hardwood extraction and government-controlled village plantations and foreign logging concessions;
- Karens against forced relocation and for the recognition of our right to land and citizenship;
- Arakenese against militarisation and threatened mining, fishing and highway construction;

industry created interest in harvesting electricity from natural dams that led to the construction of man-made dams.³² In Bangladesh, the Kaptai Dam was

-
- The Adivasi of India resisting the imposition of a new Forestry Policy that violates our rights to the forests;
 - Bhils in the Central Indian Zone oppose exclusion contained in the new Indian Forest Act, against the SSP Dam and fighting for regional autonomy, the Bhils in the Western Zone fighting to stop the dams in Narmada;
 - The Advivasi of Jharkland against national park and fighting for regional autonomy;
 - Taiwan aborigines against impoverishment and marginalisation in the cities and for the recovery of indigenous names;
 - Tamang peoples safeguarding the human rights of women and children from the negative impacts of forest degradation, promoting and protecting our own language, culture and religion and fighting for our identity;
 - Exposure of forest problems among the different indigenous peoples of Indonesia;
 - Philippine indigenous peoples reject the Philippine 2000/Philippine Medium Term Development Plan which is being posed as sustainable development and masking capitalist exploitation;
 - The Ibalays of Benguet opposing the strip-mining of their territories and the building of hydro-electric dams;
 - The Kankanaeys rejecting the commercialisation of their indigenous cultures in the name of tourism, while massive military operations are on-going in their resource-rich territories;
 - West Papua peoples oppose destructive logging, mining and human rights abuse, asserting our right to self-determination and full independence from Indonesia;
 - Naga people against human rights violations, economic exploitation, political and military domination and social separation from the imposition of the cultural and legal system;
 - The indigenous peoples of Papua New Guinea oppose destructive logging, plantation and mining.

³² M.Q. Zaman, "Land Acquisition and Compensation in Involuntary Resettlement" in "Strangers in Their Own Land," *supra* note 26 at 63.

built in the Chittagong Hill Tracts region. Almost 100,000 indigenous people (one quarter of the indigenous peoples of the Chittagong Hill Tracts region) were forced off their land as the reservoir submerged about 40 per cent of the cultivable land.³³ When the Bayano Dam was built in Panama, the Kuna peoples lost 80 percent of their reservation.³⁴ In addition to dam-building projects, geothermal energy projects have also increased in certain regions. For instance, in March 1990, the indigenous Hawaiian peoples led a demonstration in protest of geothermal development in Hawaii. In particular, they were protesting the ecological effects of drilling geothermal wells in the Wao Kele O Puna rainforest.³⁵ Construction of such large-scale projects as hydro-electric dams and geothermal wells have caused great suffering for indigenous peoples who have experienced relocations and often utter devastation of traditional lands and subsistence economies.³⁶

2.2.2 Cultural Heritage

The Spanish conquistadors instituted in the Americas what became a colonial tradition of illicit takings of the various elements of indigenous cultural heritage. Although the original focus was on raw mineral wealth, the

³³ L.G. Loffler, "Land Rights as Instruments of Social Transformation: The Case of the Chittagong Hill Tracts (Bangladesh)" in Buchi, *supra* note 11 at 124.

³⁴ Burger, *supra* note 28 at 46.

³⁵ P. Faulstich, "Hawaii's Rainforest Crunch: Land, People and Geothermal Development" in *Cultural Survival Quarterly*, *supra* note 26 at 36.

³⁶ See also Buchi, *supra* note 11 and Hitchcock, *supra* note 4 at 12-13.

Spanish conquistadors also saw the economic potential of the cultural heritage objects of the indigenous peoples they encountered. The Spanish plundering of the Inca and Aztecs peoples for their sacred and ceremonial objects is well documented. Untold quantities of these precious objects were taken from the indigenous peoples. During this era, the appropriation of the artistic, sacred and ceremonial objects of indigenous peoples was legitimized under international legal doctrines based on the moral superiority of Christian peoples over heathen (ie., non-Christian) peoples.³⁷

Once appropriated, indigenous art and cultural objects were often sold or traded within European markets where the commercial benefits remained with the takers.³⁸ Throughout the subsequent course of history, many of these objects ended up in the custody of public and private bodies³⁹, such as archives, museums⁴⁰, art galleries, and university and church collections and

³⁷ Venne, *supra* note 2 at 10.

³⁸ The Canadian Royal Commission on Aboriginal Peoples reported that some of the oldest collections of Aboriginal artifacts are concentrated in European museums and private collections: Canada, *Report of the Royal Commission on Aboriginal Peoples, Volume 3* (Ottawa: Communication Group, 1996) at 593.

³⁹ See also A. Pask, "Culturally Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture" (Dec 1993) 8 *I.P.J.* at 61 and M. Battiste and S. Henderson, *Protecting indigenous knowledge and heritage: a global challenge* (Saskatoon: Purich Publishing, 2000) 151-156 [hereinafter *A Global Challenge*] for examples of indigenous peoples in Canada attempting to repatriate culturally significant objects from museums and private collections.

⁴⁰ The Six Nations Iroquois Confederacy peoples found several wampum belts in the collection of a New York private museum; a Mikmaq wampum belt was photographed on display in the Vatican museum; a Lakota Sioux ceremonial

private collections all over the world far away from their places of origin.⁴¹ International law of the time created justifications for the act of appropriating indigenous art objects and facilitating the assertion of ownership rights by colonial peoples.⁴² Once legal ownership was asserted, colonial peoples felt justified in exercising all the various rights associated with their property regimes such as disposing of indigenous art objects through selling for profit,⁴³ destroying them to discourage heathen religious practices, or depositing them in public or private collections in the interests of preserving them as part of the common heritage of mankind.⁴⁴

Two other activities quickly became a source of concern for indigenous peoples. As European nations moved into the settlement phase of

teepee from 1840 was found in custody of a Berlin museum; and sacred ceremonial bundles of the Crow, Sac and Fox peoples have been similarly found in museums all across the US: *Cultural and intellectual property study*, *supra* note 20 at 14.

⁴¹ *Ibid.* at paras. 14 and 15.

⁴² Pask writes that the appropriation of intellectual and cultural property has not been accidentally related to colonial domination when referring to works of writers like Graham who assert that from classical antiquity onwards "victors routinely removed cultural items of the greatest importance from a city with the intent of weakening it morally or spiritually:" Pask, *supra* note 39 at 80; G.M. Graham, "Protection and Reversion of Cultural Property: Issues of Definition and Justification" (1987) 21 *Int'l Law* at 756.

⁴³ The well-known case of the theft of sacred garments from the town of Coroma highlighted the problem of art and antiquities collectors profiting from participating in illicit international trade in antiquities: S. Lobo, "The Fabric of Life" (Summer 1991) 15:3 *Cultural Survival Quarterly* at 42.

⁴⁴ P.M. Messenger, *Whose Property? Whose Culture? The Ethics of Collecting Cultural Property*, 2nd ed. (Albuquerque: University of New Mexico Press, 1999) at 5.

colonization, they often desecrated and/or destroyed sites of great sacred and ceremonial significance in the name of settlement or large-scale development projects.⁴⁵ More recently, the trend has been away from destruction to exploitation as such sites have become part of the research or tourism industry to meet the growing interest in indigenous spiritual and cultural practices.⁴⁶

Appropriation of indigenous burial sites and human remains has also long been a source of distress for indigenous peoples.⁴⁷ As they had occupied their traditional lands and territories for untold centuries, it is natural that the remains and resting places of their ancestors would be scattered the length and breadth of traditional lands and territories. During the settlement phase of colonization, indigenous peoples were often removed or displaced from their

⁴⁵ *A Global Challenge*, *supra* note 39 at 106-109, 111-113.

⁴⁶ In the US, several court cases involved disputes over sacred sites. In 1982 Lakota peoples tried to prevent the development of their sacred mountain, Bear Butte in South Dakota, as a public park would desecrate the site and lead to the exploitation of their religious practices as a tourist attraction; a 1981 case involved the Cherokee Nation's ancient capital city being flooded by a hydroelectric power project; in 1981, Navajo elders tried to prevent a ceremonial site (referred to as Rainbow Bridge) from being opened to tourism; in 1983, Hopi elders were unsuccessful in blocking the construction of a ski resort on a sacred mountain; and in 1988, Hoopa ceremonial sites were disturbed in favour of logging road construction: *Cultural and intellectual property study*, *supra* note 20 at para 40. In Australia, Ngaarrindjeri peoples fought against the construction of a bridge to a sacred island from a town in South Australia to Hindmarsh Island, which aboriginal peoples asserted was a sacred site where secret women's rituals were traditionally carried out: M. Rose, "Highest court rules against Aborigines" *The Globe and Mail* (02 April 1998) A9.

⁴⁷ *A Global Challenge*, *supra* note 39 at 113-116.

traditional lands and territories. Consequently, as researchers, scientists and private collectors began excavating sites and indigenous human remains, enforcement of European legal regimes of land and property ownership resulted in indigenous peoples being unable to have their claims to their ancestors' remains recognized.⁴⁸

The remains of thousands of indigenous people can also be found in the collections of public and private bodies such as museums and scientific institutions throughout the world. One United Nations (UN) study reports "About 18,500 individuals were found in the collection of the Smithsonian Institution alone."⁴⁹ Earlier in the 20th century, indigenous human remains were often used for display purposes as part of traveling curiosity shows, local tourist attractions or displays within various types of institutions.⁵⁰ Also taking place during this time was the unlawful mining of indigenous archaeological sites for marketable antiquities such as sacred and ceremonial objects that were buried with individuals.⁵¹

Other issues are related to the theft and appropriation of the less tangible forms of indigenous heritage. Appropriation issues in this context relate to the right of indigenous peoples to "determine the appropriateness of

⁴⁸ *Cultural and intellectual property study*, *supra* note 20 at paras. 44 – 48; *A Global Challenge*, *supra* note 39.

⁴⁹ *Cultural and intellectual property study*, *supra* note 20 at para. 46.

⁵⁰ *Ibid.* at para. 48.

⁵¹ *Ibid.* at paras. 47 - 49.

the interpretations and use being made of their cultures.”⁵² Morris wrote that taking traditional cultural productions (such as bark paintings or songs), capturing them in time-bound media, and naming them as part of creating western-defined “works of art” diminishes their true meaning and purpose (such as defining land title). She points out that:

...[W]hen these cultural productions are reduced to the level of the merely ‘artistic’ in the mainstream Australian psyche, they are understood to be only productions by the ‘talented’ for the consumption of the ‘wealthy’. Such an understanding, by its very nature, reduces the authority of these productions, and thus the traditional laws associated with them. Further, due to their mainstream characterization as ‘art’, Indigenous traditional cultural productions are frequently, and inappropriately, dealt with by the same laws as other art....

All too often the salient point that is missed is that cultural productions derive their uniqueness and power of presentation from the fact that they are law bearers, not because some desert dweller has a talented hand. The antiquity of the images that have been passed down through millennia is what gives the cultural product its aesthetic potency, not the newness of its creation by one particular individual.⁵³

In her *Study on cultural and intellectual property of indigenous peoples*, Madame Daes provided examples of inappropriate uses being made by outsiders of indigenous heritage: copying of indigenous artworks, bypassing indigenous

⁵² Pask, *supra* note 39 at 61.

⁵³ C. Morris, “Indigenous intellectual property rights: the responsibilities of maintaining the oldest continuous culture in the world” (May 1997) 4:2 *Indigenous Law Bulletin* at 9.

customary laws with respect to communal rights to traditional designs, and copying art forms such as dances, music, songs and stories.⁵⁴

A recent and increasingly controversial form of dispossession is referred to as "bio-prospecting" or "biodiversity prospecting."⁵⁵ Posey and Dutfield describe bioprospecting or biodiversity prospecting as "searching for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological, and agricultural industries."⁵⁶ De Koning observes:

...A trend has developed among biotechnology and pharmaceutical companies to explore indigenous medical or ethnobotanical knowledge of flora and fauna to discover drugs and suitable genetic resources for genetic engineering. Even human tissue of indigenous peoples has been used for these purposes by the biotechnology industry.⁵⁷

⁵⁴ See also *Cultural and intellectual property study*, *supra* note 20 at paras. 58-80.

⁵⁵ M. Davis, "Biological Diversity and Indigenous Knowledge, Research Paper 17 1997-98", online: Parliament of Australia Parliamentary Library <<http://www.aph.gov.au/library/pubs/rp/1997-98rp17.htm>> (last modified: 27 September 2001); V. Tauli-Corpuz, "Three Years After Rio: An Indigenous Assessment" in Buchi, *supra* note 11 at 46.

⁵⁶ D. A. Posey and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996) at 14 [hereinafter *Toward Traditional Resource Rights*].

⁵⁷ M. de Koning, "Biodiversity Prospecting and the Equitable Renumeration of Ethnobiological Knowledge: Reconciling Industry and Indigenous Interests" in M. Blakeney, ed., *Intellectual Property Aspects of Ethnobiology* (London: Sweet & Maxwell, 1999) at 25.

The tremendous rate of biotechnology advances has created opportunities for western science to explore new areas of potential resources.⁵⁸ A UN human rights sub-commission recently observed “modern science has developed to the point that scientists are now seeking to trace history and cure disease by investigating human, animal and plant genes.”⁵⁹ Such international economic, scientific, and legal developments have also contributed to a movement from state-sponsored research to privately-funded research such that “many major projects in scientific research, including in the field of human genome research, are conducted by large pharmaceutical companies, not universities or government research institutes.”⁶⁰ The cumulative effects of such developments on indigenous peoples are that they are becoming increasingly subjected to unregulated genome research.

Not surprisingly, indigenous peoples are becoming more vocal about the legality, ethics and effects of such bioprospecting activities on their human

⁵⁸ *Ibid.*

⁵⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human genome diversity research and indigenous peoples – Note by the Secretariat*, UN Doc. E/CN.4/Sub.2/AC.4/1998/4 (04 June 1998) at para. 1, online: UN

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/aa73d1a2696c63d5802566440048ae16?Opendocument>> (date accessed: 16 February 2002) [hereinafter *Human genome diversity research*].

⁶⁰ *Ibid.*

dignity and cultural heritage.⁶¹ They are searching for external sources of protection such as under European traditions of intellectual property law. However, among other characteristics, they are finding that intellectual property law makes no distinctions between the human and other types of genome that are protectable as intellectual property. Therefore, the current intellectual property regime does not offer protection from the appropriation of indigenous human genome⁶², of other forms of genome with which they have long been associated, as well as their knowledge of such genome.⁶³

⁶¹ Patenting of indigenous peoples' genes has become a major issue. For example, the US government tried to patent cell lines derived from a Guaymi woman, from the Hagahai peoples of Papua, New Guinea, and from the Solomon Islanders. The applications claimed that the cell lines might prove useful for the treatment of a form of leukemia and a degenerative nerve disease. Indigenous peoples were initially successful in having the applications withdrawn (the US government later refiled some of the applications): C. Bright, "Who Owns Indigenous Peoples' DNA?" (Jan/Feb 1995) 55 *The Humanist* at 44.

In another case, South Atlantic islander peoples of Tristan da Cunha attempted to assert legal control over their own genetic material. As the islanders suffer from the highest incidence of asthma in the world, they were targeted by researchers who hoped to locate the gene that predisposes people to asthma. The researchers took blood samples from almost every island resident and provided the genetic information to an American-based genomic company. The American company signed a deal with a German pharmaceutical company that would give the latter company exclusive rights worldwide to develop and commercialize the therapeutics based on the asthma genes of the Tristanians: P. Ridgen, "Companies covet genes" (Summer 1997) 23:3 *Alternatives Journal* at 8 & 9.

⁶² *Cultural and intellectual property study*, *supra* note 20 at paras. 90-102.

⁶³ *Ibid.* at paras. 103-106.

The Human Genome Diversity Project (HGDP) is one bioprospecting initiative that is creating human dignity and security issues for indigenous peoples. The project aims to collect DNA samples from over 500 linguistically distinct groups from a possible 7,000 populations worldwide as determined by a group of anthropologists “to be worthy of study.”⁶⁴ One of the groups considered “worthy of study” are isolated population groups. The Project involves collecting blood and tissue samples from at least 25 individuals from each population. As many indigenous peoples live in isolated communities, they are considered highly valued subjects of the HGDP because they have kept their bloodlines “pure.” The HGDP also emphasizes a need for haste to record the DNA of such groups because they are perceived as losing their “pure” DNA status through mixing with other population groups or by extinction.⁶⁵

Indigenous peoples are currently struggling with how to deal with the activities of such projects within their communities. Genetic research such as that conducted under the HGDP has raised many concerns for indigenous

⁶⁴ *Human genome diversity research*, *supra* note 59 at para. 6.

⁶⁵ *Ibid.* at para. 7.

peoples.⁶⁶ One group in particular identified several key concerns related to genome research:

- genetic research ethics fail to address the concerns of indigenous peoples;
- conflict with common indigenous principles and ethics;
- supplanting worldviews;
- group view of genetic inheritance;
- commercialization and ownership of life;
- gene banking and immortalization of DNA;
- sanctity of our ancestors;
- euro-centric scientific theory and discrimination;
- genetic discrimination;
- eugenics and genocidal practices; and
- funding priorities and “techno-fixes.”⁶⁷

The responses of indigenous groups to human genome research range from outright rejection of projects like the HGDP to calls for state and international assistance in developing protocols for negotiation, implementation and enforcement of a protective regime with respect to regulating such outsider activity.⁶⁸

⁶⁶ K. Ching, “Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm” (1997) 66 *Fordham Law Review* at 688, 697-699.

⁶⁷ D. Harry, S. Howard, & B.L. Shelton, *Indigenous People, Genes and Genetics – What Indigenous People Should Know About Biocolonialism* (Wadsworth: Indigenous Peoples Council on Biocolonialism, 2000) at 17-23.

⁶⁸ *Human genome diversity research*, *supra* note 59 at paras. 26 & 39.

2.2.3 Indigenous Knowledge

During the early eras of colonization, various aspects of indigenous knowledge such as cuttings and seeds were transported back to European states:

European empires also acquired knowledge of new food plants and medicines, including maize and potatoes, which made it possible to feed the growing urban concentrations of labourers needed to launch Europe's industrial revolution.⁶⁹

Representatives of different public and private groups have been harvesting plant and even human genetic material from indigenous territories for research and commercial purposes for many years. Public and private researchers have accessed and used indigenous knowledge about natural resources and ecosystems for research and commercial purposes as well, often without prior informed consent, consultation or compensation.⁷⁰ In the case of the Pueblos of the Southwest, they have farmed corn for thousands of years and have developed drought resistant and unique seed varieties such as blue corn. Since 1984, blue corn has become the basis of numerous expensive gourmet and health food products on the market and since the seed is open

⁶⁹ *Cultural and intellectual property study*, *supra* note 20 at para. 18.

⁷⁰ See collection of essays in Blakeney, *supra* note 57.

pollinated, commercial farmers can continue to produce seed and new crops without compensation to those who originally developed the variation.⁷¹

In modern times, the United States of America has distinguished itself as one of the largest consumers of indigenous knowledge from other regions.⁷² As part of its early recognition of the commercial benefits of indigenous knowledge, it has produced a body of reports and studies earlier than many other states. For example in 1993, the US Congressional Research Service reported that the pharmaceutical, horticultural and agricultural industries were realizing many benefits were to be derived from the traditional knowledge of indigenous peoples.⁷³ Private companies were busy screening plant genome samples from biodiverse regions for use in fertilizers, pesticides, dyes, and cleaning products.⁷⁴ Companies screening for medicinal properties of plants were engaged in the most intensive activities:⁷⁵ “Currently, over 200

⁷¹ S. Pinel and M. Evans, “Tribal Sovereignty and the Control of Knowledge” in T. Greaves, ed., *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma City: Society for Applied Anthropology, 1994) at 45.

⁷² *Cultural and intellectual property study*, *supra* note 20 at para. 33.

⁷³ *CRS Report for Congress, Biotechnology, Indigenous Peoples, and Intellectual Property Rights* (Washington: The Library of Congress, Congressional Research Service, 16 April 1993) at CRS-19 [hereinafter *CRS Report*].

⁷⁴ T. Johnson, “From rainforest to medicine chest: natural riches up for grabs” *Miami Herald* (12 June 1992) 1A.

⁷⁵ For example, Western pharmaceutical companies researching traditional forest medicines in Cameroon “identified 90 natural chemical substances, almost half of which were previously unknown to Western scientists”: Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Transnational investments and operations on the lands of indigenous peoples*, Report

companies and research organizations worldwide are screening compounds from plants and, to a lesser extent, animals for medicinal properties.”⁷⁶ Indigenous peoples are raising concerns about companies’ harvesting activities where companies have either extracted cuttings and plants that indigenous peoples have developed, without consultation or consent, or companies have obtained consent through questionable practices.

More recently, national governments, research institutes, universities, transnational corporations (TNCs), and international organizations⁷⁷ came to focus on indigenous knowledge for a variety of their own economic, scientific, and environmental policy reasons. Interest at the international level has been expressed through a growing body of studies, reports and discussion around

of the Centre on Transnational Corporations submitted pursuant to Sub-Commission resolution 1990/26, Doc. E/CN.4/Sub.2/1994/40 (15 June 1994) at para. 5 of Annex 1, online: UN <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/99e2c75ca19e564680256761004c0562?Opendocument>> (date accessed: 16 February 2002) [hereinafter *Transnational operations and indigenous peoples*]; Approximately three-fourths of the plant-derived drugs now in use were discovered through research involving information obtained from indigenous peoples: C. Horton, “Protecting Biodiversity & Cultural Diversity Under Intellectual Property Law: Toward a New International System” (1995) 10 J. *Envtl. Law & Litigation* at 7.

⁷⁶ CRS Report, *supra* note 73 at CRS-6.

⁷⁷ D. Dembo, C. Dias & W. Morehouse, “Biotechnology and The Third World: Some Social, Economic, Political and Legal Impacts and Concerns” (1988) 11 *Rutgers Computer & Technology Law Journal* at 436-437 [hereinafter *Biotechnology and the Third World*].

the topics of cultural heritage,⁷⁸ traditional knowledge and traditional practices,⁷⁹ and traditional methods and knowledge.⁸⁰

Indigenous peoples have become increasingly concerned about the harvesting activities⁸¹ of public and private bodies within their lands, territories and communities. The ecological and spiritual balance of their communities and ecosystems has unquestionably been disturbed by the dispossessing effects of extractive industries and activities.

2.2.4 Legal Status

The roots of dispossession for indigenous peoples can be traced back to the origins and development of international European political and legal relations. International relations were originally grounded in European values and traditions. The encounter between colonizing European nations and indigenous peoples led to the creation of international legal norms and

⁷⁸ See e.g. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people*, Final Report of the Special Rapporteur, Mrs. Erica Irene-Daes, Doc. E/CN.4/Sub.2/1995/26 (21 June 1995), online: UN <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c6646bc7fe89406f802566c0005cd3f0?Opendocument>> (date accessed: 16 February 2002) [hereinafter *Final Report on protection of heritage*].

⁷⁹ See e.g. Principle 22 of the *Rio Declaration on Environment and Development*, Report on UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, vol. I.

⁸⁰ See e.g. Agenda 21, Chapter 26, *Report of the UN Conference on Environment and Development*, Doc. A/CONF.151/26/Rev.1, vol. I, at para 26.4 (b).

⁸¹ *Cultural and intellectual property study*, *supra* note 20 at paras. 90-106.

principles that reflected European interests and resulted in indigenous peoples being dispossessed of legal status under international law.⁸²

For indigenous peoples, the lack of legal status is intimately connected with their lack of power and control resulting from the various legal doctrines of dispossession introduced in international law during the classical European era, a situation that continues to exist today.

European and other western writers on international law in the 19th century regarded this “customary” practice of Western colonizing nations as demonstrating the general acceptance of denying indigenous peoples’ territorial rights and equal sovereignty as part of the “civilized” world’s law of nations. This conception of indigenous peoples’ diminished rights and status derived from the doctrine of discovery, still retains valuable currency in international legal discourse today.⁸³

2.2.5 Lands and Territories

European colonial activities relating to land shifted from discovery and conquest to settlement of indigenous lands.⁸⁴ European political power backed by military might resulted in dispossession of indigenous peoples’

⁸² Madame Daes writes that early theorists believed that natural law had the capacity to respond to the rights and interests of the indigenous peoples of the Americas. However, the early law of nations could not stop the forces of colonization. Theorists eventually modified the law of nations to legitimize European dispossession of indigenous lands, territories and resources: *Indigenous relationship to land study, supra*, Chapter 1, note 6 at para. 27.

⁸³ Williams, *supra* note 14 at 667.

⁸⁴ See G.T. Morris, “The Right of Self-Determination for Indigenous Peoples” in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000) at 312 [hereinafter *Self-Determination in International Law*] for discussion within context of North America.

lands and territories. International legal norms and principles such as the doctrines of “terra nullius”⁸⁵ and “discovery”⁸⁶ were developed to assist in the process of divesting indigenous peoples of their lands and territories.⁸⁷

Madame Daes writes that:

There is much to be learned from indigenous peoples worldwide about the methods and legal doctrines used to dispossess them...It is safe to say that the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of States.⁸⁸

She writes that “in most situations, it was only through rationalization and military domination that colonizers secured ‘ownership’ of the lands, territories and resources of indigenous peoples.”⁸⁹

⁸⁵ This doctrine holds that indigenous lands are legally unoccupied until the arrival of a colonial presence, and can therefore become the property of the colonizing power through effective occupation. In international law, it was not until the 1973 *Western Sahara* decision that the International Court of Justice decided that “Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*.” *Western Sahara*, 1975, I.C.J. Rep. 12 at 39.

⁸⁶ This doctrine was developed between the 17th and 19th centuries to justify states gaining free title to lands previously unclaimed by it or any other European state, subject only to indigenous use and occupancy: See Williams’ discussion of the doctrine of discovery at Williams, *supra* note 14 at 672-676 and *Indigenous relationship to land study*, *supra*, Chapter 1, note 6 at para. 31.

⁸⁷ Venne, *supra* note 2 at 3; “The Right of Self-Determination for Indigenous Peoples,” *supra* note 84 at 304-305.

⁸⁸ *Indigenous relationship to land study*, *supra*, Chapter 1, note 6 at para. 23.

⁸⁹ *Ibid.* at para. 29.

Once the doctrines of conquest, *terra nullius* and discovery became less acceptable among the international community of nations, the doctrine of cession was introduced as a more palatable form of justifying European acquisition of indigenous lands and resources.⁹⁰ The established international custom of making treaty to acquire title to lands and territories through cession was applied to indigenous peoples and their lands and territories.

Whatever the justification in international law, the result was the same for indigenous peoples. Application of European legal doctrines of dispossession usually meant forced removals from traditional lands and territories, or forced relocations to smaller areas of non-traditional lands and territories.⁹¹ Forced relocation often meant loss of access to traditional lands, territories and sacred sites.⁹² As initial discovery and exploration gave way to settlement, Europeans moved indigenous peoples from commercially valuable lands to lands they deemed as worthless or of little commercial value. Only those "frontier" lands not considered worthy for settlement, agriculture or mining development were ignored during the first several eras of colonization.

⁹⁰ "The Right of Self-Determination for Indigenous Peoples," *supra* note 84 at 313.

⁹¹ K. McNeil, *Common Law Aboriginal Title* (New York: Oxford University Press, 1989) 193-306; *Indigenous relationship to land study, supra*, Chapter 1, note 6 at para. 30.

⁹² M. Flores, F. Valentine & G. Nabham, "Managing Cultural Resources in Sonoran Desert Biosphere Reserves" in (1990) 14:4 *Cultural Survival Quarterly* at 27.

Current indigenous efforts to achieve international recognition of their legal status include legal recognition of their connection with traditional lands and territories. Most indigenous peoples view their connection with the land and their territories as based on a sacred and inalienable relationship. Furthermore, the sacred and symbiotic nature of the relationship between land and all aspects of creation forms the essence of their indigenous knowledge and heritage. Little Bear explains:

Tribal territory is important because the Earth is our Mother (and this is not a metaphor: it is real). The Earth cannot be separated from the actual being of Indians. The Earth is where the continuous and/or repetitive process of creation occurs. It is on the earth and from the Earth that cycles, phases, patterns, in other words, the constant flux and motion can be observed and experienced. In other words, creation is a continuity, and if creation is to continue, then it must be renewed, and consequently, the renewal ceremonies, the telling and re-telling of the creation stories, the singing and re-singing of songs, which are the humans' part in maintenance of creation. Hence, the annual Sundance, the societal ceremonies, the unbundling of medicine bundles at certain phases of the year. All of these interrelated aspects of happenings that take place on and with Mother Earth.⁹³

⁹³ L. Little Bear, "Relationship of Aboriginal People to the Land the Aboriginal perspective on Aboriginal Title," in CD-ROM, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal peoples* (Ottawa: Canada Communications Group, 1996), cited in Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment* (Ottawa: Canada Communications Group, 1994) at 10-1.

Most if not all indigenous positions are based on achieving concurrent international recognition of their legal status and rights of association with their lands and territories.

2.3 Indigenous Responses to Dispossession

The legacy of colonization on the lands, territories, psyches, knowledge, and heritage of indigenous peoples has been profound and cannot be fully captured in words. It has already been stated that dispossession was and continues to be the central defining experience of colonization for indigenous peoples.⁹⁴

The current form of colonization involves growing world-wide interest and dispossession of indigenous knowledge and heritage. Most indigenous responses to dispossession of their knowledge and heritage involve either internal or external forms of decolonization or both. Laenui identifies five distinct social phases of an indigenous people's internal processes of decolonization: "1) rediscovery and recovery; 2) mourning; 3) dreaming; 4) commitment, and 5) action."⁹⁵ This paper focuses on the indigenous strategy of (external) political and legal forms of decolonization which involve seeking

⁹⁴ T. Simpson, *Indigenous Heritage and Self-Determination – The Cultural and Intellectual Property Rights of Indigenous Peoples* (Copenhagen: The International Work Group for Indigenous Affairs, IGWIA Document No. 86, 1997) at 50.

⁹⁵ P. Laenui, "Processes of Decolonization" in *Reclaiming Indigenous Voice and Vision, supra*, Chapter 1, note 5 at 152.

recognition and protection of indigenous knowledge and heritage through outside systems such as international law.

3. SUMMARY OF INTERNATIONAL PROTECTION OF INDIGENOUS PEOPLES AND THEIR CULTURAL HERITAGE AND KNOWLEDGE

3.1 Introduction

Indigenous peoples argue that under the current model of international relations, they do not enjoy legal status as peoples. The realities are that international law reflects the values and structures of previous eras of international relations and still operates on the principle that only legally-recognized units of international law (ie., states) can create international law through custom or treaties. Under this model of international law that relies on traditional sources of international law, indigenous peoples would be hard pressed to point to evidence of their legal status and rights in international law.¹

However, there is a growing school of thought that challenges the traditional model of international law-making. The “soft law” school of thought² was a term coined during the 1970’s by McNair³ and developed in

¹ See *infra* notes 8 and 63 and accompanying text.

² G.J.H. van Hoof, *Rethinking the Sources of International Law* (London: Kluwer Law and Taxation Publishers, 1983) at 187.

reaction to the modern problems of identifying sources of international law other than customary or conventional law, such as the legal effects of General Assembly resolutions and other documents whose legal status is unclear.

Posey and Dutfield define soft law as:

...refer[ring to] a great variety of instruments: declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions. Although all these kinds of documents lack legal status (are not legally binding), there is a strong expectation that their provisions will be respected and followed by the international community.⁴

Posey and Dutfield further argue that a growing soft law approach in international law is creating possibilities for indigenous peoples. They assert that because of the growing number and influence of international documents upholding the rights of indigenous peoples to their knowledge, territories, and resources, "it is not inconceivable that such rights could become part of international law in the near future, even if they are not included in conventions."⁵

The nature of current international initiatives on the legal recognition and protection of indigenous peoples and their concerns indicates that indigenous peoples are vigorously relying on the "soft law" approach as part

³ "Declaratory Law and Programmatic Law From Revolutionary Custom to 'Soft Law'" in R. Akkerman, *et al.*, eds., *Liber Roling, Declarations on Principles: A Question for Universal Peace* (Leyden: 1977) at 247-257.

⁴ *Toward Traditional Resource Rights*, *supra*, Chapter 2, note 56 at 120.

⁵ *Ibid.*

of their legal strategies in international law. Part III assesses international initiatives as potential sources of “hard” (or traditional) and “soft law” sources of international law regarding indigenous peoples’:

- Human right to self-determination as expressed through external forms of statehood;
- Human right to self-determination as expressed through internal forms of self-determination;
- Rights to protect their cultural heritage and knowledge under international human rights law; and
- Rights to protect their cultural heritage and knowledge under other areas of international law.

3.2 Political Recognition of Indigenous Peoples and their Concerns within the International Context

The crystallization of the public international legal norm of recognizing indigenous peoples and their rights and interests began during the post-modern era and has taken place in two stages. In the first stage, concepts were introduced into the political sphere of the international forum. In the second stage, these concepts have sometimes crystallized into rules of public international law through state custom, treaty and practice.⁶ The process of political norms evolving into legal norms is part of the “soft” law school of thought whereby political norms that started off as “soft law” can sometimes evolve into hard law.

Hannum’s analysis of the evolution of the principle of self-determination in international law is one illustration of how the “soft law”

⁶ Ching, *supra*, Chapter 2, note 66 at 718.

process works. The principle of self-determination was introduced into the political sphere of the international community, and then through state custom, treaty and practice, it became a recognized norm of public international law. Hannum outlines his interpretation of transforming a political principle into a rule of conventional international law:

Part I of this Article recounts the international norm of self-determination from Wilsonian formulations to the present. After a brief discussion of self-determination during the era of the League of Nations, the role of the United Nations in transforming a political principle into a rule of law is considered. Particular attention is given to the content of the right of self-determination as evinced by the lengthy debates leading to the adoption of the passage of the second of two international covenants on human rights in 1966.⁷

The norm of political recognition of indigenous peoples and their concerns within an international context was similarly established, through the work of the International Labour Organization (ILO), one of the first UN organs to provide for direct indigenous participation in its meetings (as representatives of Governments and accredited non-governmental organizations). Indigenous peoples participated in the discussions leading to the passage of the second of two treaties concerning their rights.⁸

⁷ H. Hannum, "Rethinking Self-Determination" in *Self-Determination in International Law*, *supra*, Chapter 2, note 84 at 196.

⁸ *Convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries* (Convention No. 107) which entered into force on 2 June 1959 and the *Convention concerning indigenous and*

Overall however, indigenous peoples have been generally excluded from the meetings of the legislative bodies of the UN system. Although Article 71 of the *UN Charter* provides that the Economic and Social Council (ECOSOC) may make suitable arrangements for consultation with non-governmental organizations (NGO's),⁹ generally indigenous peoples have not used this avenue of participation within the UN system. In his 1996 report, the Secretary-General explained that it was likely due to:

...the political, social and cultural specificity of indigenous people themselves. Traditionally, indigenous people do not organize themselves in non-governmental structures, which is a precondition for achieving consultative status. In many countries, indigenous people maintain flourishing governments or administrations of their own, often pre-dating the Governments of the States in which they live. It has been stated by many indigenous people at the sessions of the Working Group on Indigenous Populations that establishing non-governmental entities is incompatible with their history of self-government. This may explain the reluctance of certain indigenous people to form non-governmental organizations for the purpose of participating in United Nations meetings.¹⁰

tribal peoples in independent countries (Convention No. 169) which entered into force 5 September 1991; See also *supra* note 63.

⁹ ESC Res. 1296 (LXIV) of 23 May 1968, revised in its ESC Res. 1996/31 of 25 July 1996.

¹⁰ General Assembly, *Review of the existing mechanisms, procedures and programmes within the UN concerning indigenous peoples* – Report of the Secretary-General, GA Res. A/51/493, GA OR, 51st Sess., UN Doc. A/51/493 (14 November 1996) at para. 38, online: UN <<http://www.unhchr.ch/huridocda/huridoca/nsf/Documents?OpenFramest>> (date accessed: 15 February 2002) [hereinafter *Review of UN existing mechanisms*].

Indigenous peoples pursued lobbying and advocacy support from UN-accredited NGO's (eg., Amnesty International, UNESCO, World Council of Churches) with the UN ECOSOC (the parent body of the UN human rights and social policy organs).¹¹ NGO's that were sympathetic to the situation of indigenous peoples sponsored two conferences in 1977 and 1981 in Geneva, Switzerland that drew world attention to the situation of indigenous peoples.¹² The 1977 Conference called for action by the UN to hold hearings on all issues affecting indigenous peoples of the Americas, to establish a forum for the decolonization of indigenous peoples of the Americas, and to establish a working group under the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.¹³

The following year, the World Conference to Combat Racism and Racial Discrimination (1978)¹⁴ also made similar recommendations, but the UN did not take any action and a subsequent NGO-sponsored Conference on

¹¹ S. J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 41.

¹² Venne, *supra*, Chapter 2, note 2 at 108.

¹³ "International NGO Conference on Discrimination Against Indigenous Peoples in the Americas - 1977" (1977) 3 *American Indian Journal of the Institute for the Development of Indian Law* at 4-5.

¹⁴ Between 1973 and 2003, the UN designated three decades for action to combat racism and racial discrimination and to ensure support for people struggling for racial equality. The first World Conference to Combat Racism and Racial Discrimination was held in Geneva in 1978, at the mid-point of the first Decade.

indigenous peoples and the land was called in 1981.¹⁵ The 1981 NGO Conference recommended that the UN act immediately to establish a forum for indigenous peoples. As a probable result of the second wave of lobbying efforts, the Sub-Commission recommended to the Commission on Human Rights (CHR) and then to the ECOSOC that a Working Group be established. Within the year, the ECOSOC created the Working Group on Indigenous Populations under the Sub-Commission on Prevention of Discrimination and Protection of Minorities (that reports to the CHR within the UN system).¹⁶ The Working Group is comprised of five experts who serve in their individual capacities rather than as state representatives and has a two-fold mandate: 1) to review developments pertaining to the human rights of indigenous peoples; and 2) to develop standards to protect their rights.¹⁷ Indigenous peoples were finally recognized by the international community as distinct and having concerns worthy of special attention.

This international forum restricted indigenous participation at first due to UN legal protocols on participation. Under the UN system, only recognized international actors such as states, specialized agencies and accredited NGO's have the right of full participation in UN meetings. As a

¹⁵ Venne, *supra*, Chapter 2, note 2 at 109.

¹⁶ ESC Res. 1982/34, UNESCOR, 28th plenary mtg., UN Doc. 1982/34 (7 May 1982).

¹⁷ *Ibid.*

result of the first meeting of the Working Group and its decision to suspend the usual participation and accreditation procedures¹⁸, indigenous peoples were finally able to achieve the first step in gaining political legitimacy within an international forum.

In 1993, Indigenous peoples were successful in expanding international consideration of their status and concerns beyond the Working Group when they succeeded in having 1993 proclaimed by the General Assembly as the International Year of Indigenous People¹⁹ and by gaining special attention on the agenda of the 1993 World Conference on Human Rights. The 1993 World Conference adopted the *Vienna Declaration* and Programme of Action²⁰ that symbolized the historic steps being taken to promote and protect the rights of particular vulnerable groups such as women, children and indigenous peoples. Principle 20 recognizes:

...the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of

¹⁸ Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its first session*, UN ESCOR, 1982, UN Doc. E/CN.4/Sub.2/1982/33.

¹⁹ GA Res. 45/164, UN GAOR, 1990, UN Doc. A/RES/45/164 (18 December 1990).

²⁰ General Assembly, *Report of the World Conference on Human Rights – Report of the Secretary-General*, UN GAOR, UN Doc. C/CONF.157/24 (Part I) (13 October 1993).

indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.²¹

Articles 28 to 32 of the recommendations in the World Conference's

Programme of Action focused on action respecting indigenous peoples:

- the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of a declaration on the rights of indigenous people at its eleventh session;
- the Commission on Human Rights consider the renewal and updating of the mandate of the Working Group on Indigenous Populations upon completion of the drafting of a declaration on the rights of indigenous people;
- advisory services and technical assistance programmes within the United Nations system respond positively to requests by States for assistance which would be of direct benefit to indigenous people. Further that adequate human and financial resources be made available to the Centre for Human Rights within the overall framework of strengthening the Centre's activities as envisaged by this document;
- States are urged to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them;
- the General Assembly proclaim an international decade of the world's indigenous people, to begin from January 1994, including action-orientated programmes, to be decided

²¹ *Ibid.*

upon in partnership with indigenous people. An appropriate voluntary trust fund should be set up for this purpose as well as the consideration of the establishment of a permanent forum for indigenous people in the United Nations system.²²

In response to some of the recommendations of the 1993 Vienna World Conference, the UN General Assembly proclaimed 1995-2004 would be the International Decade of the World's Indigenous People, with the main objective being to strengthen international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health.²³ A Voluntary Fund for the Decade was established to assist the funding of projects and programmes which would promote the goals of the International Decade. In 1995, the General Assembly also authorized a comprehensive program of activities to be carried out through the UN system.²⁴

As part of the General Assembly's request for interim reports by the High Commissioner and the Secretary-General on the progress of the International Decade of Indigenous Peoples' activities, the Secretary-General prepared a review of existing mechanisms, procedures and programmes

²² *Ibid.*

²³ General Assembly, *International Decade of the World's Indigenous People*, GA Res. 48/163, UN GAOR, 48th Sess., UN Doc. A/RES/48/163 (18 February 1994).

²⁴ General Assembly, *Programme of activities for the International Decade of the World's Indigenous People*, GA Res. 50/157, UN GAOR, 97th plenary mtg. of 21 Dec. 1995, UN Doc. A/RES/50/157 (21 December 1995).

concerning indigenous peoples within the UN. The Secretary-General administered a questionnaire that asked UN organizations, specialized agencies and other relevant UN departments, committees and NGO's about:

(a) indigenous participation in the general or legislative bodies of the organization or agencies; (b) specific meetings on indigenous issues; (c) research, policy planning, or internal policy guidelines related to indigenous people; (d) specific programmes or projects for indigenous people; and (e) future activities in connection with indigenous people.²⁵

The Third Committee of the General Assembly also recommended in 1995 that the Secretary-General ensure coordinated follow-up to recommendations concerning indigenous peoples from relevant UN Conferences such as:

(b) the World Conference on Human Rights, the United Nations Conference on Environment and Development, the International Conference on Population and Development, the Fourth World Conference on Women and the World Summit for Social Development...²⁶

In July 2000, the ECOSOC adopted by consensus a resolution to establish a Permanent Forum for Indigenous Issues.²⁷ The Permanent Forum would represent the culmination of years of indigenous lobbying, triggered by a recommendation by the 1993 UN-sponsored Vienna World Conference on

²⁵ *Review of UN existing mechanisms*, *supra* note 10 at paras. 13 & 14.

²⁶ *Supra* note 24.

²⁷ Economic and Social Council, *Establishment of a Permanent Forum on Indigenous Issues*, ESOCOR Res. 2000/22, 45th plenary mtg., UN Doc. E/RES/2000/22 (28 July 2000).

Human Rights²⁸. The Permanent Forum will be comprised of 16 independent experts, eight to be nominated by states and eight independent indigenous experts to be appointed by the President of the Council after reviewing recommendations from indigenous organizations and groups. It will serve as an advisory body to the ECOSOC, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is mandated to:

- a. provide advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the UN through the Council;
- b. raise awareness and promote the integration and coordination of activities relating to the indigenous issues within the UN system; and
- c. to prepare and disseminate information on indigenous issues.

The first session of the Permanent Forum was held in New York from May 13 - 24, 2002.²⁹ It consisted of a general debate and review of the activities of the United Nations system relating to indigenous peoples, discussion of future work of the Permanent Forum, and adoption of an agenda for the second session.

²⁸ *Supra*, note 20 at chap. III, sect. II.B, para. 32.

²⁹ *Permanent Forum on Indigenous Issues*, online, UN, Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/indigenous/forum.htm>> (date accessed: May 26, 2002).

It is evident that indigenous peoples have completed the first step of influencing the development of the international norm of *political* recognition of their status and concerns within the international forum. Having achieved this goal, the next step for indigenous peoples is to ensure the crystallization of political norms into *legal* norms of recognition by continuing to influence the generation of both “soft” and “hard” sources of international law respecting their legal status and concerns.

3.3 Legal Recognition of Indigenous Peoples’ Status and Concerns under International Human Rights Law

For many indigenous groups, a logical starting point for attaining their goals for legal recognition is through international human rights law. The justificatory basis common across many, if not all, indigenous peoples’ positions is that they are entitled to recognition of their human right to self-determination. The concept of the human right to self-determination comes closest to expressing the nature of rights and entitlements they wish to attain. Through legal recognition of their fundamental human right to self-determination as peoples, indigenous peoples envision attaining the rights and powers afforded to actors in international law to secure the quality of their current lives as well as their future destinies.³⁰

³⁰ J.B. Henriksen, “The Right of Self-Determination: Indigenous Peoples v. States,” *supra*, Chapter 2, note 1 at 137-138; Williams, *supra*, Chapter 2, note 14 at 668-670.

3.3.1 Human Right to External Forms of Self-Determination

Early international recognition of the right to self-determination typically took the form of legal status as independent states. The early work of the UN contributed to the establishment of a legal norm that recognized the illegitimacy of colonialism and the right of territories colonized by distant Western powers to become independent states.³¹ The 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*³² was the first formal recognition of the right to self-determination by the modern organization of states.

State resistance to the concept of self-determination was almost immediate because the very existence of the human right to self-determination challenged the core principles of the international legal system:

It challenges the sovereignty of states and their territorial integrity, it interferes in matters within the domestic jurisdiction of states and it makes applications of treaties uncertain. Self-determination also confronts the very nature of international law and whether it is primarily and essentially about relations between states.³³

Therefore the earliest forms of recognition of the human right to self-determination for peoples within the UN organization were strictly limited to the decolonization context.

³¹ Hannum, *supra* note 7 at 261.

³² A/RES/1514 (XV), 14 December 1960.

³³ R. McCorquodale, "Introduction" in *Self-Determination in International Law*, *supra*, Chapter 2, note 84 at xi.

Writers often characterized the two major forms of the right to self-determination as external and internal, with states' interests as the point of reference. McCorquodale provides the following description:

External self-determination was applied most frequently to colonial situations as it concerns directly the territory of a State – its division, enlargement or change – and the State's consequent international ("external") relations with other States...The "internal" aspect of the right concerns the right of peoples within a State to choose their political status, the extent of their political participation and the form of their government, ie., a State's "internal" relations are affected.³⁴

The "soft law" process of the evolution of the political to legal recognition of the right to self-determination took form through recognizing the right to decolonize. The UN decolonization policy was carried out through General Assembly resolutions and other initiatives.³⁵ General Assembly resolution 1541 (XV), for instance, established the three recognized forms of self-determination of the time:

- (a) emergence as a sovereign independent State;
- (b) free association with an independent State; or
- (c) integration with an independent State.³⁶

The Special Committee on the Situation with Regard to the Implementation of the 1960 *Declaration on the Granting of Independence to Colonial Countries and*

³⁴ R. McCorquodale, "Self-Determination: A Human Rights Approach" in *Self-Determination in International Law*, *supra*, Chapter 2, note 84 at 863-864.

³⁵ *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the UN Charter*, G.A. Res. 2625 (XXV), 24 October 1970.

³⁶ GA Res. 1541 (XV), GA OR, 15th Session, Supp. 16, p. 29(196).

*Peoples*³⁷ was charged by the General Assembly with the tasks of examining the application of the *Declaration* and making suggestions and recommendations on the progress and extent of its application. The effectiveness of the follow-up work of the Committee of Twenty-Four no doubt contributed to the pressure emanating from the UN to carry out the *Declaration* goals of bringing colonialism to a speedy end.³⁸

Although the International Court of Justice (ICJ) does not create international law, its decisions are perceived as evidence of international law.³⁹ The ICJ contributed two noteworthy cases in the early 1970s on the issue of colonized peoples and their rights to self-determination under international law: the 1971 *Namibia Advisory Opinion*⁴⁰ and the 1975 *Western Sahara Advisory Opinion*⁴¹. In the *Western Sahara* decision, the Court stated that lands of indigenous peoples could not be claimed by European states using theories of *terra nullius*, discovery or conquest. Further, it supported the principle that colonial and other formerly dependent peoples have a right to self-

³⁷ The Special Committee was also referred to as the Committee of Twenty-Four.

³⁸ Van Hoof, *supra* note 2 at 272.

³⁹ W. Levi, *Contemporary International Law*, 2nd ed. (San Francisco: Westview Press, 1991) at 50.

⁴⁰ *Advisory Opinion of the International Court of Justice*, [1971] I.C.J. Rep. 16. [Hereinafter *Namibia*].

⁴¹ *Supra*, Chapter 2, note 85 at para. 55.

determination under Resolution 1514 (XV).⁴² The Court concluded by defining the right to self-determination as “the need to pay regard to the freely expressed will of the peoples.”⁴³

The first modern opportunity for indigenous peoples to assert their right to self-determination came through the growing international recognition of the human right to self-determination in the form of decolonization. The decolonization movement resulted in statehood status for many formerly colonized peoples (including indigenous peoples); however the narrow scope of decolonization excluded many indigenous groups living within independent states that were formerly colonies.

Initially, states insisted on the use of objective criteria in determining which peoples could justifiably claim the right to self-determination. External-based objective criteria were used to assess the appropriate characteristics of “peoplehood” of groups who were claiming the right to self-determination.

⁴² *Ibid.*

⁴³ *Ibid.* at 68. White writes that the “outcome of the Western Sahara dispute was not a happy one.” Morocco, Mauritania and Spain continue to dispute over Western Sahara despite the conclusions of the ICJ. She reports that “this has left the Polisario, the independence movement of the Saharans, to declare the independence of the Western Sahara and to wage a guerilla war in pursuit of the claim to self-determination.” R. White, “Self-Determination: Time for a Re-Assessment?” in McCorquodale, *supra*, Chapter 2, note 84 at 433. Since 1975, the UN has been engaged in a long series of unsuccessful negotiations, reports and missions to facilitate the decolonization of the Western Sahara through the holding of a referendum. The *Western Sahara* case represents one indigenous peoples’ (thus far) unsuccessful attempt to achieve external self-determination.

Cristescu's following definition of the term "peoples" in a UN report on the topic of self-determination helped set the tone for approaching the concept and definition of peoples within the UN:

- (a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;
- (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
- (c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in Article 27 of the ICCPR.⁴⁴

Cristescu's definition pointedly excluded minorities from qualifying as peoples.

3.3.2 Human Right to Internal Forms of Self-Determination

The concepts of "peoples" and "self-determination" entered into international discourse at the same time and were treated as corollary concepts within the human rights legal framework. Both concepts were introduced in international law under the human rights framework.⁴⁵ The right to self-

⁴⁴ B. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" in *Self-Determination in International Law*, *supra*, Chapter 2, note 84 at 286; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The right to self-determination: historical and current developments on the basis of UN instruments* - Study/prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1981/E/CN.4/Sub.2/404/Rev.1.

⁴⁵ J. Anaya, "Self-Determination as a Collective Human Right Under Contemporary International Law," *supra*, Chapter 2, note 1 at 4.

determination is enshrined in common Article 1 of the widely ratified international human rights covenants:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁴⁶

Generally, the concept of “peoples” referred to groups that identified themselves as distinct from the majority populations of states through a shared sense of history, culture and future interests. The concept of self-determination expanded over time to include both subjective and objective elements for the purposes of international law.

The objective element is that there has to exist an ethnic group linked by common history...It is not enough to have an ethnic link in the sense of past genealogy and history. It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such.⁴⁷

Indigenous peoples closely identified with this expanded definition of the right to self-determination because the subjective aspect expressed their own normative conceptions of self-determination. They began including the expanded form of the concept of self-determination in various international statements. For instance, the Fourth General Assembly of the World Council

⁴⁶ *International Covenant on Civil and Political Rights (ICCPR)*, concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, concluded 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3.

⁴⁷ Kiwanuka, *supra* note 44 at 285.

of Indigenous Peoples held in Panama in September 1984 issued a Declaration of Principles:

2. All Indigenous Peoples have the right to self-determination. By virtue of this right they can freely determine their political, economic, social, religious and cultural development in agreement with the principles stated in this declaration.⁴⁸

In 1992, Article 11 of the Charter of the Indigenous/Tribal Peoples of the Tropical Forests demanded respect for their rights through "[T]he approval and application of the Universal Declaration of Indigenous Peoples, which must affirm and guarantee our right to self determination, being developed by the United Nations, and the setting up of an effective international mechanism and tribunal to protect us against the violation of our rights and guarantee the application of the principles set out in this charter."⁴⁹ The 1992 Kari-Oca Declaration proclaimed that self-determination was expressed as "the right to decide our own forms of government, to use our own laws and to raise and educate our children, to our own cultural identity without interference..."⁵⁰ In the 1993 Mataatua Declaration, indigenous peoples declared that "indigenous

⁴⁸ "Appendix 3 - Declaration of Principles of the World Council of Indigenous Peoples" in *Toward Traditional Resource Rights*, *supra*, Chapter 2, note 56 at 179.

⁴⁹ "Charter of the Indigenous Tribal Peoples of the Tropical Forests" in *Indigenous Peoples & Forests*, *supra*, Chapter 2, note 27 at 19 (Penang, Malaysia, 15 February 1992).

⁵⁰ "Kari-Oca Declaration and Indigenous Peoples Earth Charter" in *Indigenous Peoples & Forests*, *supra*, Chapter 2, note 27 at 33 (Kari-Oca, Brazil, 25-30 May 1992).

peoples of the world have the right to self-determination and in exercising that right must be recognized as the exclusive owners of their cultural and intellectual property.”⁵¹

The expansion of the concept of the right to self-determination occurred on several levels. Firstly, there was the growing norm of including the subjective aspect in the concept of peoples.⁵² Secondly, the expansion of the concept moved from a focus on individual human rights to a broader sense of collective human rights. Kiwanuka summarizes this second form of expansion:

- (1) The individual remains the primary subject of international human rights law.
- (2) International human rights law recognizes the existence of groups.
- (3) The enjoyment of individual human rights requires certain human rights to devolve directly upon groups.⁵³

Kiwanuka explains the nature of the relationship between collective and individual human rights:

...the effective exercise of collective rights is a precondition to the exercise of other rights...If a community is not free, most of its members are also deprived of many important rights...collective rights could be regarded as *sui generis*.

⁵¹ “The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, in *Toward Traditional Resource Rights*, *supra*, Chapter 2, note 56 at 205 (Whakatane, Aotearoa/New Zealand, 2-8 June 1993).

⁵² See *supra* note 63 and accompanying text for discussion of the growing norm of international acceptance of a subjective aspect to the definition of “indigenous peoples.”

⁵³ Kiwanuka, *supra* note 44 at 283.

When the group secures the right in question, then the benefits redound to its individual constituents and are distributed as individual human rights.⁵⁴

For Kiwanuka, who is writing about the meaning of people within the context of the 1982 *African Charter on Human and Peoples Rights*, there is a conceptual difference between collective (peoples') rights and individual human rights. He concludes "the *Banjul Charter* at least theoretically recognizes that all classes of rights (political, economic, individual and collective) are equal and synergetic."⁵⁵ The *Banjul Charter* is one example of the post-modern influence of newly recognized states operating from their own (non-European) ideologies and normative conceptions of international political and legal order.

Indigenous peoples' visions of their human right to self-determination run the entire spectrum of the various modes of self-determination currently recognized within international human rights law. Some desire to gain legal status as independent states, while others desire more limited forms of autonomy.⁵⁶ Henriksen supports this latter view when he writes:

Indigenous peoples view this matter from a political and philosophical angle founded on the principle of equality and discrimination: calling for equality with regard to the right of

⁵⁴ *Ibid.* at 284.

⁵⁵ *Ibid.* at 285.

⁵⁶ Aroha Te Pareake Mead, *supra*, Chapter 2, note 13 at 22; B. Kingsbury, "Reconstructing Self-Determination: A Relational Approach," *supra*, Chapter 2, note 1 at 24-25.

self-determination – without necessarily wishing to establish their own state.⁵⁷

States, on the other hand, have been characterized as being resistant to recognizing indigenous peoples' visions of self-determination for different reasons, one of which is the perceived threat to the *status quo* structure of a state-centered system of international relations.⁵⁸ In reflecting on the progress of the Draft Declaration on the Rights of Indigenous Peoples through the UN system, Madame Daes writes:

Through all these years, governments have remained skeptical as to the right of self-determination of indigenous peoples. There have been exceptions, but a majority of governments has continued to express fear and uncertainty about self-determination, in particular about Article 3 of the draft Declaration.⁵⁹

Generally, UN member states' positions have been justified primarily on the basis of two arguments. The first is that indigenous peoples were more appropriately characterized as "minorities," not "peoples." As such, their rights and interests were protectable under the existing human rights structure

⁵⁷ Henriksen, *supra* note 30 at 136.

⁵⁸ P. Thornberry, "Self-Determination and Indigenous Peoples: Objections and Responses," *supra*, Chapter 2, note 1 at 54.

⁵⁹ E.A. Daes, "The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration," *supra*, Chapter 2, note 1 at 78.

that provided a conceptual place and protections for the rights of minorities.⁶⁰ The *ILO Convention No. 107* of 1957 was the first treaty expression of international concern towards members of indigenous groups, focusing on the vulnerability of indigenous workers.⁶¹ The treaty recognized indigenous peoples as minority groups deserving of special treatment. The 1957 *ILO Convention* was rejected by indigenous peoples because their representatives were not included in the drafting, the provisions that ended up in the *Convention* treated indigenous peoples as minorities, and the entire instrument was ultimately assimilationist in bent.⁶²

The *ILO Convention No. 169* of 1989⁶³ was ILO's effort to remove the assimilationist orientation of the 1957 *ILO Convention* and to adopt new standards on the subject of indigenous peoples in light of growing international recognition of the rights and concerns of indigenous and tribal peoples. The *ILO Convention No. 169* replaced the term "populations" with "peoples" and recognized a subjective aspect to self-definition⁶⁴. While Article

⁶⁰ J.J. Corntassel and T.H. Primeau, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination'" (1995) 17 *Human Rights Quarterly* at 344-345.

⁶¹ See *supra* note 8; Anaya, *supra* note 11 at 44.

⁶² K. Myntti, "The Right of Indigenous Peoples to Self-Determination and Effective Participation," *supra*, Chapter 2, note 1 at 118.

⁶³ *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, concluded 27 June 1989, entered into force 5 September 1991, 72 *ILO Official Bulletin* 59; reprinted in 28 *I.L.M.* 1382 (1989).

⁶⁴ *Ibid.* at Article 1(2).

1 of the *ILO Convention No. 169* refers to indigenous peoples as “peoples,” Article 3 limits indigenous peoples’ rights to self-determination, such as the rights to secession or statehood⁶⁵:

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.⁶⁶

The ILO treaties opened the door for recognition of indigenous peoples as distinctive groups worthy of special treatment in international law. However, the form of recognition was limited to minority rights and hence proved unsatisfactory to indigenous peoples. In any event, neither instrument was widely ratified by states; and therefore did not offer many indigenous peoples the practical opportunity of relying on the minority rights protected under the two treaties.

In 1967, the UN established a minimal standard of recognition of the rights of minorities in Article 27 of the *International Covenant on Civil and Political Rights*; however it did not include a definition of the term “minorities.” The UN commissioned several studies to define minorities and to ascertain whether the term included the right to self-determination and indigenous peoples. The Rapporteurs of the studies both concluded that indigenous

⁶⁵ Myntti, *supra* note 62.

⁶⁶ *Supra* note 63 at Article 1(3).

peoples and minorities did not belong under the same definition.⁶⁷ Madame Daes agrees "a strict distinction must be made between indigenous peoples' rights and minority rights - indigenous peoples are 'indeed peoples and not minorities.'" ⁶⁸

In 1970, Special Rapporteur Cobo was commissioned by the UN to study indigenous peoples' problems with discrimination. In his 1983 final report, Cobo outlined six objective criteria for identifying indigenous peoples as "peoples," and in doing so contributed to the establishment of the practice⁶⁹

⁶⁷ Venne, *supra*, Chapter 2, note 2 at 81.

⁶⁸ Working Group on Indigenous Populations, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people,"* UN ESCOR, 14th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996).

⁶⁹ It can be argued that Article 1 of 1989 *ILO Convention No. 169* established the practice of referring to indigenous peoples as peoples in international law:

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, regain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

of referring to indigenous peoples as “peoples” within the UN system (as opposed to populations or minorities):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁷⁰

Although the definitions proposed by Cobo were never formally adopted by the UN General Assembly, his final report and its terms and concepts was eventually accepted and endorsed by other organs within the UN system: the Sub-Commission, the CHR and the ECOSOC.⁷¹ Kingsbury concludes “In the evolving law of self-determination, a normative category of ‘indigenous peoples’ has come increasingly to occupy a distinctive place.”⁷²

The second argument made by states that are resistant to recognizing indigenous peoples’ right to self-determination is that there are no definitions for the terms “peoples” and “indigenous” in accepted sources of international law; therefore, there are no accepted objective criteria by which to judge whether indigenous groups are “peoples.” In response to these arguments,

⁷⁰ Cobo Study, *supra*, Chapter 1, note 1 at 29.

⁷¹ Venne, *supra*, Chapter 2, note 2 at 93.

⁷² Kingsbury, *supra*, Chapter 2, note 1 at 37.

Venne points out that the UN has promoted self-determination and protection of human rights among member states in over sixty international treaties and declarations.⁷³ She notes that none of these instruments contain complete definitions for terms such as self-determination, peoples, or nations and are still widely recognized and respected as sources of law.⁷⁴ Arguably therefore, there is no reason why the UN system must insist upon the definition of “peoples” before they will determine whether indigenous peoples meet the criteria. Venne asks “Why are ‘Peoples’ recognized as having rights, but by placing ‘Indigenous’ before ‘Peoples’ any recognized rights are negated?”⁷⁵

While early attempts to recognize indigenous peoples within the international context resulted in treaties that were ultimately rejected by many indigenous peoples as being too assimilationist in bent⁷⁶, other UN initiatives in the form of General Assembly decisions, resolutions, reports, and programmes relating to the topic and concerns of indigenous peoples within the UN General Assembly and its various human rights subsystems can be examined for evidence of “soft law” recognizing indigenous peoples as “peoples” with a right to self-determination.

⁷³ Venne, *supra*, Chapter 2, note 2 at 68.

⁷⁴ *Ibid.* at 68 & 95.

⁷⁵ *Ibid.* at 94.

⁷⁶ See *supra* note 8 for list of *ILO Conventions*.

In 1982, the Working Group on Indigenous Populations was established as an organ of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁷⁷ Within three years, the CHR recommended that the Working Group begin preparing a declaration on substantive indigenous rights that could be adopted by the General Assembly.⁷⁸ This UN initiative was intended to generate a Declaration that would eventually be adopted through General Assembly resolution much like the *Universal Declaration of Human Rights*.⁷⁹

In August of 1993, the Working Group submitted the Draft Declaration on the Rights of Indigenous Peoples to the Sub-Commission and the Sub-Commission adopted it without revision.⁸⁰ The draft *Declaration* is divided into 19 preambular paragraphs and 45 operative paragraphs with seven parts.⁸¹ In the winter of 1995, the Sub-Commission submitted it to the CHR, the first level where the draft declaration would be reviewed by state representatives. The CHR was not prepared to accept the draft declaration as recommended by the Sub-Commission and decided to establish an Open-

⁷⁷ The name was changed to Sub-Commission on the Promotion and Protection of Human Rights by a decision of the ECOSOC of 27 July 1999.

⁷⁸ E/CN.4/RES/1985/21.

⁷⁹ Venne, *supra*, Chapter 2, note 2 at 112.

⁸⁰ Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Indigenous Populations*, UN ESCOR, 35th mtg., UN Doc. E/CN.4/Sub.2/1993/29, Add. 1-2 (26 August 1993) [hereinafter *Report of the Working Group on Indigenous Populations at its 35th mtg.*].

⁸¹ *Ibid.*

ended Inter-sessional Working Group to elaborate the Draft further⁸². The first meeting of the Inter-sessional Working Group was held in Geneva in November and December of 1995. At that meeting, none of the Draft articles had broad support by state representatives because they were uncomfortable with the “peoples,” self-determination, land and resource rights and the collective rights provisions.⁸³ Many state governments were opposed to:

The use of the term “peoples” since it would imply that indigenous peoples were considered to be subjects of international law and as such would be entitled to the right of self-determination and sovereignty over natural resources. Some Governments expressed the concern that the use of the term “peoples” would also lead to a denial of the rights of individuals in favour of collective rights. In answer to the claim that collective rights did not exist in international human rights law, several Government and indigenous organizations stated that such rights existed in various international instruments and referred to the right of self-determination as reflected in the Charter of the United Nations and the International Covenants on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide and the African Charter on Human and Peoples’ Rights, as well as norms relating to peace and security, and environment and development.⁸⁴

⁸² Commission on Human Rights, *Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, Commission on Human Rights Res. 1995/32, UN ESCOR, 51st Sess., UN Doc. E/CN.4/RES/1995/32 (3 March 1995).

⁸³ Venne, *supra*, Chapter 2, note 2 at 122 & 159.

⁸⁴ Commission on Human Rights, *Report of the Working Group established in accordance with Commission on Human Rights Res. 1995/32 of 3 March 1995 - Chairperson-Rapporteur: Mr. José Urrutia (Peru)*, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/1996/84 at 9 (4 January 1996).

For their part, despite their diverse circumstances, indigenous representatives were steadfastly unanimous on four key areas they agreed had to be protected in the proposed *Draft Declaration*: “recognition of people with no imposed definition, self-determination, and land and resource rights.”⁸⁵

Indigenous representatives’ position on the subjective aspect of the definitions of self-determination and peoples was based on two points of argument: First of all, they simply refused to accept an externally imposed definition. Secondly, recent trends in international human rights law on the concept of self-determination appear to support both an objective and subjective component. Indigenous representatives take the position that they prefer a definition of peoples to contain both components. Opekokew writes that peoples have a right to determine their common existence, to prescribe criteria for group membership, as well as to live together and perpetuate common traditions.⁸⁶ Venne takes the position that indigenous peoples possess an inherent right to identify themselves according to their own normative conceptions, including the right to remain free of imposed definitions.⁸⁷

⁸⁵ Venne, *supra*, Chapter 2, note 2 at 115.

⁸⁶ D. Opekokew, “International Law, International Institutions and Indigenous Issues” in R. Thompson, ed., *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon, SK: University of Saskatchewan, Native Law Centre, 1987) at 2.

⁸⁷ Venne, *supra*, Chapter 2, note 2 at 87.

In their participation during the drafting of the *Draft Declaration*, indigenous representatives agreed that it was not necessary to include a definition of indigenous peoples believing that self-identification should remain firmly within the control of indigenous peoples. Article 8 of the *Draft Declaration* was therefore drafted to recognize the right of indigenous peoples to identify themselves. The result is Article 3 that is fashioned as the indigenous version of the opening articles of the 1967 *Human Rights Covenants*:

Indigenous Peoples have the right of Self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁸⁸

Indigenous peoples can also look to regional developments and initiatives as indications of the growing international legal norm to recognize their presence, legal status and concerns. Examples can be found in the work of such regional organizations as: Organization of African Unity, Council of Europe, and the Organization of American States. For instance, the Organization of African Unity adopted the *African Charter* in 1981 that entered into force in 1986.⁸⁹ The *African Charter* offers a unique model for human rights protection as it is based on the traditions of indigenous African Peoples. First of all, it is based on principles of mediation, conciliation and consensus

⁸⁸ D. Sanders, "Draft Declaration on the Rights of Indigenous Peoples - Commentaries" [1994] 1 C.N.L.R. at 48.

⁸⁹ *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5; reprinted in 21 I.L.M. 59 (1982).

building as opposed to confrontational or adversarial approaches.⁹⁰ Secondly, it speaks to collective as well as individual forms of the human right to self-determination.⁹¹ The second initiative worthy of note is the 1995 draft declaration on the rights of indigenous Peoples drafted by the members of the Inter-American Commission on Human Rights in observance of the International Decade of the World's Indigenous People.⁹²

Indigenous normative conceptions of their human right to self-determination include visions of independent statehood; however, the main expressions within the international fora are for internal forms of self-determination. For instance, the Draft Declaration contains references to internal forms of self-determination, as articulated by indigenous peoples.

Madame Daes reports:

The Draft Declaration not only acknowledges Indigenous Peoples as "Peoples" in the international sense, but recognizes that they continue to possess a distinct legal character and standing even in cases where they have agreed to be incorporated into existing states. This is of cardinal importance because indigenous peoples generally do not aspire to separate statehood; while at the same time, they do not see that they can ever accept complete integration into the states which comprise the United Nations.⁹³

⁹⁰ C. Flinterman and E. Ankumah, "The African Charter on Human and Peoples' Rights" in H. Hannum, ed., *Guide to International Human Rights Practice*, 3rd ed. (Ardsley, NY: Transnational Publishers, 1999) at 163 & 171.

⁹¹ *Ibid.*

⁹² Venne, *supra*, Chapter 2, note 2 at 39.

⁹³ *Ibid.* at 119.

Madame Daes makes emphatic reference to the indigenous conceptions of self-determination as being firmly focused on internal forms:

Self-determination, in the context of Indigenous peoples, then, refers to autonomy or internal self-government within, and I repeat, within existing States. A self-governing Indigenous people within a State would have a legal status of its own and access to international fora.⁹⁴

Contemporary international human rights law has moved beyond legal recognition of a right to self-determination limited to a decolonization context. Thornberry identifies four bases of argument from which groups (such as indigenous peoples) can make that argument:

- (i) Further reflections on the metamorphic and open nature of the international system – in the further evolution of which indigenous groups are claiming their place;
- (ii) Continuing dialogue (even under conditions of less than perfect equality between participants) between groups and governments which aims at illuminating areas of difficulty – the objections to self-determination particularly from the human rights viewpoint have a certain weight cannot be dismissed lightly, and need to be addressed;
- (iii) Advocacy of a view of indigenous self-determination which engages a general benefit from its exercise – the indigenous should also be changed to ‘universalize’ their discourse to the extent that systemic benefits could be envisaged for the common good;
- (iv) Justificatory arguments for indigenous self-determination – equality, fairness, historical reparation, the liberty to pursue ways of life and face the world on their own terms without being overborne by the force of others.⁹⁵

⁹⁴ Sanders, *supra* note 88 at 13.

⁹⁵ Thornberry, *supra*, Chapter 2, note 1 at 63.

Henriksen argues that the *Charter* vision of collective human security is what now drives the moral and philosophical justification for peoples' right of self-determination.⁹⁶ Within this framework, the right of self-determination

...can include, but is not limited to, guarantees of cultural security, forms of self-governance; economic self-reliance; effective participation at the international level; land rights; ability to care for the environment; and spiritual freedom.⁹⁷

The various elements of self-determination that Henriksen enumerates are necessary to ensure the free expression and protection of collective identity in dignity. Indigenous peoples can accordingly seize the opportunity to ground their own legal argument for recognition of their human right to self-determination as peoples based on two points of argument. The first is on the basis of their right to human security:

The human security of indigenous peoples encompasses elements such as physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects. A desirable situation with respect to human security exists when the people concerned and its individual members have adequate legal and political guarantees for the implementation of their fundamental rights and freedoms, including the right of self-determination. Moreover, one has to take into account the relative aspects of human security, in particular the subjective feeling of security. The right of self-determination includes all of these interdependent aspects, which can only be fully realized through the complete recognition and implementation of all of them.⁹⁸

⁹⁶ Henriksen, *supra*, Chapter 2, note 1 at 131.

⁹⁷ *Ibid.* at 133.

⁹⁸ *Ibid.* at 138.

The second point of indigenous argument for legal recognitions of their human right to self-determination can be grounded on Thornberry's fourth justificatory ground: that contemporary principles of human rights and self-determination dictate that indigenous peoples are entitled to pursue their ways of life free of colonization and oppression, based on their freedom of "liberty to pursue ways of life and face the world on their own terms without being overborne by the force of others."⁹⁹ In short, a colonial framework of international relations is no longer tenable in contemporary international society.

3.3.3 Self-Determination Right to Protect Cultural Heritage and Knowledge

This section explores indigenous peoples' self-determination arguments for international legal protection of their distinctive cultural heritage under human rights law, outlines some of the inherent problems with international law as a source of protection, and examines evidence of a growing body of "soft law" around the issue of indigenous peoples' self-determination right to protection of their cultural heritage under international human rights law.

⁹⁹ Thornberry, *supra*, Chapter 2, note 1 at 165.

Internal forms of the right to self-determination for indigenous peoples must begin with recognition of indigenous peoples as the point of reference.¹⁰⁰ Madame Daes writes:

The existence of a genuine right of self-determination cannot be determined from the outward form of indigenous peoples' self-governing or administrative institutions. The true test is a more subjective one, which must be addressed by the indigenous peoples themselves. In other words, the amount of power and money transferred to indigenous institutions is not a measure of self-determination. The indigenous people must feel secure in their right to make choices for themselves – to live well and humanely in their own ways.¹⁰¹

For many indigenous peoples, recognition of their human right to internal forms of self-determination encompasses the rights and responsibilities to create, implement and enforce their own political, economic, social, cultural and legal regimes. The indigenous normative conception of self-determination is also collective in nature, including the rights and responsibilities to make the decisions about all aspects of their lives such as their cultural heritage.

One of the areas of rights and responsibilities that is of particularly pressing concern is protection of cultural heritage. At present, indigenous peoples are being dispossessed of many aspects of their cultural heritage, threatening their current and future survival as a culturally-distinct peoples.

¹⁰⁰ This is captured by Article 3 of the Draft Declaration on the Rights of Indigenous Peoples: "Indigenous Peoples have the right of Self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

¹⁰¹ Daes, *supra*, Chapter 2, note 1 at 80.

In Part II, indigenous peoples' issues and concerns with respect to this issue were discussed in depth. In response, indigenous peoples have been communicating their issues and concerns with respect to their cultural heritage across many mediums and fora.

There is a growing international indigenous voice and movement to protect all aspects of indigenous cultural heritage.¹⁰² In 1996, one international (non-indigenous) network undertook a survey of statements made by indigenous and non-indigenous groups to ascertain the themes of concerns being raised by groups such as indigenous peoples and farmers groups.¹⁰³ Of the 63 indigenous statements canvassed (including statements of individual indigenous organizations and those resulting from indigenous conferences), two of the six themes related directly to concerns about cultural heritage: 1) respect for Indigenous knowledge; protection of medicinal plants, etc.; and the right to determine standards for development; and 2) cultural rights: the right

¹⁰² See Appendix 1.

¹⁰³ The Programme for Traditional Resource Rights is a self-funded network affiliated with - and based at - the Oxford Centre for the Environment, Ethics and Society (OCEES), Mansfield College, University of Oxford that aims to further the rights of all indigenous and local communities embodying traditional lifestyles by acting as a base for information, research, and providing knowledge of appropriate mechanisms for protecting the integrity of indigenous knowledge and resources. See <<http://www.users.ox.ac.uk/~wgtrr/>> (last modified: 9 Jan. 2002).

to have and express distinct culture; the right to language; access to sacred sites; and to practice religion freely.¹⁰⁴

Organizations of indigenous peoples such as the Co-ordinating Body of Indigenous Peoples of the Amazon Basin (COICA) have recently expressed their own visions of self-determination as related to the issue of cultural heritage. COICA perceived the concept of self-determination as subsuming rights to intangible, cultural, scientific and intellectual resources:

3. All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self-determination. For Indigenous peoples, accordingly, the ultimate decision on this issue is dependent on self-determination...¹⁰⁵

The First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, held under the auspices of the Working Group on Indigenous Populations in 1993, resulted in the Mataatua Declaration that expressed a similar interrelationship between self-determination and cultural heritage: "...Indigenous Peoples of the world have the right to self-

¹⁰⁴ D.A. Posey, "Mind the Gaps: Identifying Commonalities and Divergencies between Indigenous Peoples and Farmers Group" (Protecting Knowledge - Traditional Resource Rights in the New Millennium, Vancouver, British Columbia, Canada, 23-26 February, 2000), online: Union of BC Indian Chiefs <<http://www.ubcic.bc.ca/protect.htm>>(date accessed: 2 May 2000) at 4.

¹⁰⁵ "COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity" in *Toward Traditional Resource Rights*, *supra*, Chapter 2, note 56 at 215 (Santa Cruz de la Sierra, Bolivia, 28-30 September 1994).

determination: and in exercising that right must be recognized as the exclusive owners of their cultural and intellectual property..."¹⁰⁶

The most significant initiatives within the UN human rights system with respect to generating political and "soft law" recognition of the issue of indigenous cultural heritage began during the 1990's. In response to indigenous concerns, the Working Group on Indigenous Populations commissioned the Special Rapporteur to undertake a number of studies with respect to the protection of indigenous cultural and intellectual property. Madame Erica-Irene Daes has since produced a comprehensive body of work for the UN on the issue of the protection of the cultural and intellectual property of indigenous peoples.¹⁰⁷ Her work is considered credible by indigenous peoples because she ensured indigenous participation in every stage of the Working Group's work.¹⁰⁸

Madame Daes discovered that non-indigenous societies and indigenous peoples understood and approached the concept of knowledge and

¹⁰⁶ The Mataatua Declaration was issued as a result of the *First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, Whakatane, Aotearoa New Zealand, June 12-18, 1993*, and is included as an annex to the Chairperson's 1993/28 Study, E/CN.4/Sub.2/AC.4/1993/CPR.5; See also *supra*, Chapter 2, note 56 at 205.

¹⁰⁷ For list of working documents, see *infra* note 131.

¹⁰⁸ Ordinarily, as non-recognized subjects of international law, indigenous peoples would not have had the standing to participate directly within the work of United Nations organs. However, the Working Group introduced almost immediately the exception to the norm of exclusion by suspending normal rules of standing and participation for indigenous peoples.

cultural heritage in profoundly different ways. Modern international regimes regulating cultural heritage and intellectual expressions are based on European conceptual frameworks that distinguish between these elements of heritage.¹⁰⁹ The problem created by seemingly incompatible conceptual approaches is that "...rather than attempting to understand Indigenous knowledge as a distinct knowledge system, researchers have tried to make Indigenous knowledge match the existing academic categories of Eurocentric knowledge."¹¹⁰ Even within these categories, elements of indigenous heritage are further sub-classified into different expressions such as arts and sciences. Battiste and Henderson point out that these types of conceptual frameworks do not capture the holistic aspect of indigenous knowledge. They provide an example of the holistic approach required by indigenous knowledge using Inuit knowledge:

The Inuit illustrate the principle of the totality of knowledge. In English translations, the Inuit define their traditional knowledge as practical teaching and experience passed on from generation to generation. Their knowledge is a total way of life that comprises a system of respect, sharing, and rules governing the use of resources. It is derived from knowing the country they live in, including knowledge of the environment and the relationship between things. Inuit knowledge is rooted in the spiritual life, health, culture, and language of the people. It comes from the spirit in order to survive, and it gives credibility to the Inuit. They assert it as a holistic worldview that cannot be compartmentalized or separated from the people who hold it. It is using the heart

¹⁰⁹ *Cultural and intellectual property study, supra*, Chapter 2, note 20 at para. 21.

¹¹⁰ *A Global Challenge, supra*, Chapter 2, note 39 at 39.

and head together in a good way. It is dynamic, cumulative, and stable. It is the truth and reality....¹¹¹

Indigenous organizations and individuals are adding their contribution to the international discourse on what is meant by indigenous heritage and knowledge. Battiste and Henderson approach the concepts of indigenous heritage and knowledge as reflections of peoples' ways of knowing. They caution that explaining or learning about indigenous knowledge cannot be done adequately through non-indigenous languages or methodologies because no legitimate methodology exists to answer the question "What is indigenous knowledge?"¹¹² They offer their interpretations that indigenous knowledge involves viewing "every way of life from two different but complementary perspectives: first as a manifestation of human knowledge, heritage, and consciousness, and second as a mode of ecological order."¹¹³ (The perspective of indigenous knowledge that serves as a mode of ecological order is often referred to as "traditional ecological knowledge.")

Battiste and Henderson state that indigenous knowledge or ways of knowing share the following structure:

...(1) knowledge of and belief in unseen powers in the ecosystem; (2) knowledge that all things in the ecosystem are dependent on each other; (3) knowledge that reality is structured according to most of the linguistic concepts by

¹¹¹ *Ibid.* at 43.

¹¹² *Ibid.* at 35.

¹¹³ *Ibid.*

which Indigenous describe it; (4) knowledge that personal relationships reinforce the bond between persons, communities, and ecosystems; (5) knowledge that sacred traditions and persons who know these traditions are responsible for teaching “morals” and “ethics” to practitioners who are then given responsibility for this specialized knowledge and its dissemination; and (6) knowledge that an extended kinship passes on teachings and social practices from generation to generation.¹¹⁴

It is significant for indigenous peoples that, early on in her work, the Special Rapporteur for the Working Group on Indigenous Populations agreed with the indigenous position that “ it is inappropriate to subdivide the heritage of indigenous peoples into separate legal categories such as cultural, artistic or intellectual; or to subdivide it into separate elements such as songs, stories, science or sacred sites.”¹¹⁵ Madame Daes found that it is more appropriate to avoid making such distinctions for indigenous peoples and concluded “it is clear existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate but inherently unsuitable for the needs of indigenous peoples.”¹¹⁶

Madame Daes concluded her various reports and studies for the Sub-Commission by recommending that any protective regimes designed by the international community take the approach of managing and protecting all

¹¹⁴ *Ibid.* at 42.

¹¹⁵ *Cultural and intellectual property study, supra*, Chapter 2, note 20 at paras. 26 & 31.

¹¹⁶ *Ibid.* at para. 32.

elements of indigenous heritage as a single, interrelated and integrated whole.¹¹⁷ In a Conference hosted by the Chiefs of British Columbia, Canada, on the topic of "Protecting Knowledge - Traditional Resource Rights in the New Millennium," Madame Daes emphasized the fact that indigenous heritage is a holistic bundle of interrelated aspects including land, peoples and resources:

The old ceremonies, songs and names kept people tied to the land, and continually reminded people of their responsibilities. Strip away the ceremonies, symbols and knowledge from the land, or sell them off, and people will no longer feel responsible for the land. The heritage of a people is deeply rooted in their traditional territory. Heritage is not only a reflection and a celebration of a people's territory - it is a management system for the territory, and separating heritage from the land may have serious adverse ecological and social consequences.¹¹⁸

The shift in Madame Daes' thinking is evidenced by the evolving nature of her work on the issue of protection of indigenous cultural heritage. It is significant that her shift in thinking appears to be endorsed by states members sitting on the CHR and the ECOSOC who review the work of the

¹¹⁷ *Final Report on protection of heritage, supra*, Chapter 2, note 78 at 10.

¹¹⁸ Dr. Erica-Irene A. Daes, "Keynote Address - Defending Indigenous Peoples' Heritage" (Protecting Knowledge - Traditional Resource rights in the New Millennium, Union of BC Indian Chiefs, Vancouver, BC, Canada, 23 -26 February), online: Union of British Columbia Indian Chiefs, <<http://www.ubcic.bc.ca/protect.htm>> (last modified: 19 February 2002).

Working Group on Indigenous Populations and the Sub-commission on the Promotion and Protection of Human Rights.¹¹⁹

In 1990, the Sub-Commission passed a resolution authorizing Madame Daes to prepare a working paper on the question of ownership and control of the cultural property of indigenous peoples for submission to the Working Group on Indigenous Populations at its 9th session.¹²⁰ In 1991, the Sub-Commission passed a resolution directing the Secretary-General to prepare a concise note on the extent to which indigenous peoples can utilize existing international standards and mechanisms for the protection of their intellectual property.¹²¹ At the same session, the Sub-commission authorized Madame Daes to prepare a study for submission at its 45th session of measures that should be undertaken by the international community to strengthen respect for the cultural property of indigenous peoples.

In 1992, after reviewing the Secretary-General's concise note, the Sub-Commission noted the growing conviction of the link between cultural and intellectual property for indigenous peoples and directed Madame Daes to

¹¹⁹ Below these bodies in the UN structure, the Working Group on Indigenous Populations and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities are comprised of human rights experts acting in their individual capacities and not as representatives of states: Venne, *supra*, Chapter 2, note 2 at 48.

¹²⁰ Sub-Commission Res. 1990/25 (31 August 1990).

¹²¹ Sub-Commission Res. 1991/31, UN ESCOR, 43rd Sess., UN Doc. E/CN.4/Sub.2/RES/1991/31 (29 August 1991).

consider this special relationship in her report.¹²² They recommended that the title of Madame Daes' study be revised to "protection of the cultural and intellectual property of indigenous peoples."¹²³ Their recommendations were approved by states sitting on the Commission of Human Rights¹²⁴ as well as by the ECOSOC¹²⁵.

In her groundbreaking study that relied heavily on the participation of indigenous peoples and on examples from the United States and Australia, Madame Daes identified some of the major issues and concerns that have affected and are currently affecting indigenous cultural heritage.

- A. Protection and use of sacred sites
- B. Return and reburial of human remains
- C. Recovery of sacred and ceremonial objects
- D. Ensuring the authenticity of artworks
- E. Communal rights to traditional designs
- F. Issues in the performing arts
- G. Breaches of confidentiality
- H. Tourism and problems of privacy
- I. Medical research and "bio-prospecting"
- J. Indigenous science and technology
- K. Community control of research
- L. Professional organizations and ethics...¹²⁶

¹²² Sub-Commission Res. 1992/35, UN ESCOR, 44th Sess., UN Doc. E/CN.4/Sub.2/RES/1992/35 (27 August 1992).

¹²³ *Ibid.*

¹²⁴ Commission on Human Rights Dec. 1992/114, UN ESCOR, 48th Sess., UN Doc. E/CN.4/DEC/1992/114 (3 March 1992).

¹²⁵ Economic and Social Council Dec. 1992/256, UN Doc. E/DEC/1992/256 (20 July 1992).

¹²⁶ *Cultural and intellectual property study, supra*, Chapter 2, note 20 at 2.

With the assistance of indigenous representatives, Madame Erica Daes drafted a definition of indigenous heritage in her 1993 *Study on the protection of the cultural and intellectual property of indigenous peoples* that proved to be consistent with indigenous peoples' normative conceptions: "everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples."¹²⁷ In 1993, the *Draft Declaration on the Rights of Indigenous Peoples* included provisions related to the protection of indigenous cultural heritage and knowledge:

Article 12

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

...

Article 13

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

¹²⁷ *Ibid.* at 8.

...

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals. They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

...

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.¹²⁸

In 1993, the Sub-Commission endorsed Madame Daes' study and recommendations¹²⁹ and requested draft principles and guidelines for the protection of the heritage of indigenous peoples.¹³⁰ The fact that indigenous normative conceptions had been taken into account in the UN approach to their concerns was evidenced by the changing terminology: ie., movement from use of cultural property to cultural and intellectual property to cultural

¹²⁸ *Report of the Working Group on Indigenous Populations at its 35th mtg., supra* note 80.

¹²⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Cultural and intellectual property of indigenous people*, Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1993/44, 35th mtg., UN Doc. E/CN.4/Sub.2/RES/1993/28 (26 August 1993).

¹³⁰ *Ibid.*

heritage concepts.¹³¹ The reception and acceptance of these concepts was indicated through the endorsement of the Sub-Commission's recommendations by state representatives sitting on the CHR¹³² and the ECOSOC.¹³³

In preparing the draft principles and guidelines for the international legal protection of the heritage of indigenous peoples as part of her *Final report on the protection of the heritage of indigenous people*¹³⁴, Madame Daes explicitly deferred to indigenous normative understandings of their own cultural heritage and knowledge (as endorsed and directed by the two UN organs). Madame Daes elaborated further on the definition of cultural heritage in the draft Principles and Guidelines included in her *Final report*:

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory.

¹³¹ *Working paper on the question of ownership and control of the cultural property of indigenous peoples*, Doc. 1991/34; *Study on the protection of the cultural and intellectual property of indigenous peoples*, Doc. 1993/28; *Protection of the heritage of indigenous peoples – Preliminary Report*, Doc. 1994/31; *Protection of the heritage of indigenous peoples – Final Report*, Doc. 1995/26; *Protection of the heritage of indigenous peoples – Supplementary Report*, Doc. 1996/22; *Report of the technical meeting on the Protection of the heritage of indigenous peoples*, Doc. 1997/15; and *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples*, Doc. 2000/26.

¹³² Commission on Human Rights, *Cultural and intellectual property of indigenous people*, Commission on Human Rights Dec. 1994/105, 50th Sess., UN Doc. E/CN.4/DEC/1994/105 (4 March 1994).

¹³³ Economic and Social Council, *Cultural and intellectual property of indigenous people*, ESC Dec.1994/274, 43rd plenary mtg., UN Doc. E/DEC/1994/274 (25 July 1994).

¹³⁴ *Final Report on protection of heritage*, *supra*, Chapter 2, note 78.

The heritage of an indigenous peoples also includes objects, knowledge and literary or artistic works which may be created in the future based on their heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotapes, or audiotape.¹³⁵

In the subsequent internal UN review process, the Commission on Human Rights recommended that the Secretary-General distribute the *Final Report* to NGO's and indigenous peoples so that Madame Daes could prepare a Supplementary Report on the basis of their feedback.¹³⁶ The Commission's decision was endorsed by the ECOSOC.¹³⁷ By 1996, UN activity regarding indigenous cultural heritage had developed to the point that the Sub-Commission decided to recommend, first of all, that the Draft Principles and Guidelines (contained in the annex to the *Final report on the protection of the heritage of indigenous peoples*¹³⁸) be adopted by the CHR.¹³⁹ This is a significant

¹³⁵ See Annex in *Final Report on protection of heritage, supra*, Chapter 2, note 78.

¹³⁶ Commission on Human Rights, *Protection of the heritage of indigenous people*, Commission on Human Rights Res. 1996/63, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/RES/1996/63 (23 Apr 1996).

¹³⁷ Economic and Social Council, *Protection of the heritage of indigenous people*, ESC Res. 1996/24, UN ESCOR, 1996, UN Doc. E/RES/1996/24.

¹³⁸ *Supra*, Chapter 2, note 78.

step in the formal process of moving the draft instrument through the UN, hopefully culminating in a declaration from the UN General Assembly or a treaty on the topic. Other significant recommendations emerging from the 1996 session (35th meeting) of the Sub-Commission included:

- supporting the decision of WIPO and UNESCO to organize a joint symposium (para. 4);
- placing a high priority on indigenous knowledge through the *Convention on Biological Diversity* and technical work undertaken (para. 5);
- coordinating the work of UN bodies and that the Secretary-General is to convene technical meeting of UN bodies (para. 6); and
- the Working Group on Indigenous Populations is to exchange information with other UN bodies (para. 8).¹⁴⁰

In March 1997, the Secretary-General convened a technical meeting to discuss the *Final Report on the protection of the heritage of indigenous peoples* and its draft principles and guidelines. The seminar included representatives from various UN organs, specialized agencies and indigenous organizations. One of the conclusions and recommendations emerging from the seminar was the importance of having the relevant agencies and bodies of the UN system coordinate and harmonize their efforts in relation to the protection of the

¹³⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people*, Sub-Commission Res. 1996/37, UN ESCOR, 35th mtg., UN Doc. E/CN.4/Sub.2/RES/1996/37 (29 August 1996).

¹⁴⁰ *Ibid.*

heritage of the world's indigenous people.¹⁴¹ Further, the Commission on Human Rights should take action on the principles and guidelines submitted to it by the Sub-commission.¹⁴²

In August 1997, the Sub-commission recommended that the UN High Commissioner convene a seminar on the draft principles and guidelines prior to the 16th session of the Working Group on Indigenous Populations and the 50th session of the Sub-Commission.¹⁴³ The seminar was held from 28 February to 1 March 2000 and a report was submitted to the Sub-Commission in August 2000.¹⁴⁴ The Sub-Commission decided to transmit the revised draft principles and guidelines annexed to the report of the seminar to the CHR for its action.¹⁴⁵

¹⁴¹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Technical Meeting on the Protection of the Heritage of Indigenous People* (Geneva, 6-7 March 1997), UN ESCOR, 49th Sess., UN Doc. E/CN.4/Sub.2/1997/15 (24 June 1997) at para. 27 [hereinafter *Report of the Technical Meeting*].

¹⁴² *Ibid.* at para. 34.

¹⁴³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people*, Sub-Commission Res. 1997/13, UN ESCOR, 27th mtg., UN Doc. E/CN.4/Sub.2/1997/13 (22 August 1997); endorsed by CHR Dec. 1998/103 of 9 April 1998 and ESC Dec. 1998/277 of 30 July 1998.

¹⁴⁴ Sub-Commission on the Promotion and Protection of Human Rights, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples* (Geneva, 28 Feb. – 1 March 2000), UN ESCOR, 52nd Sess., UN Doc. E/CN.4/Sub.2/2000/26 (19 June 2000).

¹⁴⁵ Sub-Commission on the Promotion and Protection of Human Rights, *Draft principle and guidelines for the protection of the heritage of indigenous peoples*, Sub-Commission Dec. 2000/107, UN Doc. E/CN.4/Sub.2/DEC/2000/107 (17 August 2000).

The growing use of the cultural heritage conception (as opposed to the cultural and intellectual property conception) with respect to the issues and concerns of indigenous peoples, is demonstrated by the shift in the approach and production of reports, studies and recommendations at the various UN human rights levels.¹⁴⁶ Further, indigenous emphasis on the need for a coordinated international response has resulted in the UN human rights bodies undertaking to review initiatives of other parts of the UN system relating to indigenous cultural heritage.¹⁴⁷

Indigenous peoples have been particularly alarmed about human genome research activities targeted at harvesting, appropriating, and

¹⁴⁶ See *supra* note 131.

¹⁴⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Transnational investments and operations on the lands of indigenous peoples – Report of the Centre on Transnational Corporations submitted pursuant to Sub-Commission resolution 1990/26*, UN Doc. E/CN.4/Sub.2/1994/40 (15 June 1994); General Assembly, *Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people*, Report of the Secretary-General, UN GAOR, 51st Sess., UN Doc. A/51/493 (14 November 1996); Working Group on Indigenous Populations, *Compilation of general recommendations from human rights treaty bodies referring to indigenous peoples – Note by the Secretariat*, UN ESCOR, 16th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1998/5 (10 June 1988); Sub-Commission on the Promotion and Protection of Human Rights, *Working paper on indigenous people and their relationship to land*, UN ESCOR, 33rd mtg., UN Doc. E/CN.4/Sub.2/RES/1999/21 (26 August 1999); Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property and human rights*, Sub-Commission Res. 2001/21, UN ESCOR, 26th mtg., UN Doc. E/CN.4/Sub.2/RES/2001/21 (16 August 2001); Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property and human rights – Report of the Secretary-General*, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/Sub.2/2001/12/Add.1 (3 July 2001).

commodifying their unique molecular essences.¹⁴⁸ Since human genome issues are treated as human rights and intellectual property issues within the international forum, indigenous peoples have responded to human genome issues as relating to and belonging with their human rights and cultural heritage.¹⁴⁹ In light of the Sub-Commission's resolution 1997/15 that recognized the need for systematic analysis of this issue and the growing debate and apparent mistrust between indigenous peoples and outside researchers, the Working Group on Indigenous Populations secretariat prepared preliminary information on growing indigenous concerns about human genome research impacting on them.¹⁵⁰ The passage of the 1998 *Universal Declaration on the Human Genome and Human Rights*¹⁵¹ was seen by

¹⁴⁸ Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project (Phoenix, Arizona, 19 February 1995), online: Alaska Native Knowledge Network <<http://www.ankn.uaf.edu/declaration.html>>(date accessed: 22 September 2001); Latin American Declaration on Transgenic Organisms (Quito, Ecuador, January 1999), online: GENET, The European NGO Network on Genetic Engineering <<http://www.gene.ch/info4action/1999/Feb/msg00031.html>> (date accessed: 22 September 2001).

¹⁴⁹ See *supra*, Chapter 2, notes 59-63 and accompanying text.

¹⁵⁰ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Decade of the World's Indigenous People*, UN ESCOR, 27th mtg., UN Doc. E/CN.4/Sub.2/RES/1997/15 (22 August 1997) at para. 9.

¹⁵¹ The *Universal Declaration on the Human Genome and Human Rights*, finalized by a Committee of governmental experts, was adopted unanimously and by acclamation at the twenty-ninth session of UNESCO's General Conference on 11 November 1997. The following year the Declaration was endorsed by the UN General Assembly: *The human genome and human rights*, GA Res. 53/152, UN GAOR, 85th plenary mtg., UN Doc. A/RES/53/152 (9 December 1998).

indigenous peoples as a useful starting point for determining their own goals and objectives with respect to regulating human genome research.

Indigenous peoples' external strategies have focused on being recognized as peoples under international human rights law and, as such, being able to exercise the rights and powers to protect their internal cultural heritage regimes. Besides influencing the evolution of a political to a legal recognition of their status as self-determining peoples, they have been successful in influencing a growing body of "soft law" on protecting their indigenous knowledge and heritage, the most promising of which is the draft Principles and Guidelines hopefully on the path to forming the basis of a General Assembly Declaration on the Protection of Indigenous Heritage.

3.4 Legal Recognition of Indigenous Heritage and Knowledge Under Other Areas of International Law

3.4.1 International Environmental Law

The trends of interdependence and globalization have influenced the changing structure of international society and law since the Second World War.¹⁵² One example of the globalization trend occurred in 1972 when the UN Conference on the Human Environment (Stockholm Conference) considered

¹⁵² R.P. Dhokalia, "Reflections on International Law-Making and Its Progressive Development in the Contemporary Era of Transition" in R.P. Dhokalia & R. S. Pathak, eds., *International Law in Transition - Essays in Memory of Judge Nagendra Singh* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 207 and 211.

the global effects of industrialization on the environment for the first time at an international level.¹⁵³ As a result of the Conference, a Governing Council was established in 1975 that reports to the General Assembly through the ECOSOC.¹⁵⁴ Its main functions are to promote, coordinate and implement the various initiatives organized through the UN Environment Programme (UNEP).

Between 1972 and 1987, international concern about the global issue of environmental degradation increased tremendously. NGO's in particular contributed to the introduction of environmental issues into international debate:

During the decade and a half following the Stockholm meeting, the explosion of public concern about the environment, expressed through the emergence of a host of non-governmental organizations (NGOs), changed the nature of public debate. Problems of environmental degradation, rainforest destruction, the loss of biological diversity and pollution with impunity were linked to the increasing concentration of wealth and power. Democratic movements rose up to effectively challenge powerful corporations and their government allies...¹⁵⁵

NGO's and other groups have drawn attention to the link between the colonial (capitalist and industrial) activities of European and their descendant nation states on the global economy and environment. The impact of the

¹⁵³ *Indigenous Peoples & Forests, supra*, Chapter 2, note 56 at 13.

¹⁵⁴ Established in accordance with GA Res. 2997 (XXVII).

¹⁵⁵ *Indigenous Peoples & Forests, supra*, Chapter 2, note 56 at 13-14.

industrial revolution in Europe and the industrial boom after World War II reflected European attitudes as European states accepted environmental degradation as a necessary exchange for economic growth through colonialism. European normative conceptions are characterized as being anthropocentric (or human-centered) where human kind is apart from, and dominant over, the rest of the natural world:

Modern society operates from the foundation of belief that "nothing in nature can resist the human will." In effect, human beings "through technological advance [will seek] to simulate and redesign to our liking all biological processes, so that we may achieve ever more control over the conditions of life"...The arrogant anthropocentrism of the dominant world-view permeates every aspect of modern life including the structure of our economic system, the legal-institutional framework erected to support it, and the mechanisms by which we regulate our relationship with external reality, the ecosphere.¹⁵⁶

Environmental degradation has long been perceived by indigenous peoples as the legacy of centuries of colonialism. It was the *Stockholm Declaration* where the rest of the world also began expressing an international awareness of environmental degradation and loss of biodiversity.

...We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross

¹⁵⁶ K. Michelson and W. Rees, "The Environment: Ecological and Ethical Dimensions" in E. Hughes, A. Hughes, & W. Tilleman II, eds., *Environmental Law and Policy* (Toronto: Emond Montgomery, 1998) 1 at 4 [footnotes omitted].

deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.¹⁵⁷

In 1984, the World Commission on Environment and Development met for the first time and published its report entitled *Our Common Future* three years later.¹⁵⁸ The report affirmed the catastrophic state of the global environment and how environmental degradation was perceived to be stemming from centuries of unsustainable industrial practices.¹⁵⁹ The Commission also noted the accelerating rates of loss of biological diversity:

There is a growing scientific consensus that species are disappearing at rates never before witnessed on the planet. ...Many ecosystems that are rich biologically and promising in material benefits are severely threatened. Vast stocks of biological diversity are in danger of disappearing just as science is learning how to exploit genetic variability through the advances of genetic engineering. Numerous studies document this crisis with examples from tropical forests, temperate forests, mangrove forests, coral reefs, savannas, grasslands, and arid zones...¹⁶⁰

The Brundtland Commission concluded by advocating the approach of “sustainable development” as a viable way that economic development could continue to meet “the needs of the present without compromising the

¹⁵⁷ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I

¹⁵⁸ *Our Common Future*, *supra*, Chapter 2, note 3.

¹⁵⁹ *Ibid.* at 2.

¹⁶⁰ *Ibid.* at 148.

ability of future generations to meet their own needs.”¹⁶¹ The Brundtland report also made direct reference to the situation of indigenous peoples:

These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems. It is a terrible irony that as formal development reaches more deeply into rain forests, deserts, and other isolated environments, it tends to destroy the only cultures that have proved able to thrive in these environments.

The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life – rights they may define in terms that do not fit into standard legal systems. These groups’ own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.¹⁶²

The findings of the Brundtland report led to the UN Conference on Environment and Development (Earth Summit) in June 1992. At the summit in Rio de Janeiro, more than 170 states met to discuss the recommendations of the Brundtland Report. The Conference resulted in the *Rio Declaration on*

¹⁶¹ *Ibid.* at 8.

¹⁶² *Ibid.* at 114-116.

*Environment and Development*¹⁶³ and an 800-page document entitled *Agenda 21*.¹⁶⁴ Principle 22 of the *Rio Declaration* specifically referred to the situation of indigenous peoples:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Agenda 21 was an action plan of UN initiatives to protect and promote conservation of global biological diversity. While many chapters of *Agenda 21* referred generally to the role of indigenous peoples¹⁶⁵, Chapter 26 (Recognising and Strengthening The Role of Indigenous Peoples and their Communities) dealt specifically with indigenous peoples. The *Convention on Biodiversity* was finalized in Nairobi in May 1992, discussed at the Earth Summit in June 1992, subsequently signed by 150 UN member states present at the UNCED, and entered into force in December 1993.¹⁶⁶ It represented a significant development in international commitment to the idea of a need for a global

¹⁶³ *Supra*, Chapter 2, note 78.

¹⁶⁴ *Ibid.*

¹⁶⁵ Buchi, *supra*, Chapter 2, note 11 at 41.

¹⁶⁶ United Nations, Earth Summit: *Convention on Biological Diversity: final text* (Paris: Dept. of Public Info., 1992); opened for signature at United Nations Conference on Environment and Development, June 5, 1992, 31 *I.L.M.* 818; online, United Nations Environment Programme <<<http://www.biodiv.org/convention/articles.asp>> (last modified 9 April 2002); as of 12 September 2001, the CBD has 181 Parties (168 Signatures).

environmental policy among states, driven by the spectre of a looming environmental catastrophe if nothing is done now to promote protection of the earth and its biodiversity.¹⁶⁷ For the first time, a multilateral treaty was negotiated between states that were mindful of environmental issues affecting indigenous heritage and knowledge.

The most significant provision of the *Convention on Biological Diversity* (CBD)¹⁶⁸ for indigenous peoples is Article 8(j) that provides that states shall, as far as possible and as appropriate:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.¹⁶⁹

Other articles, such as Articles 10(c), 17.2 and 18.4,¹⁷⁰ also spoke directly and indirectly about issues affecting indigenous and local communities.

Article 10(c) laid out Sustainable Use of Components of Biological Diversity where states undertook to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are

¹⁶⁷ L. Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 295.

¹⁶⁸ *Supra*, note 166.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

compatible with conservation or sustainable use requirements.” Article 17.2 dealt with Exchange of Information where states undertook to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Article 18.4 dealt with Technical and Scientific Cooperation where states undertook to “in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies and also to promote cooperation in the training of personnel and exchange of experts.”

The *CBD* has since given birth to protocols, programmes, and other initiatives related to specific aspects of environmental and biodiversity protection as part of the work of the Conference of the Parties (COP).¹⁷¹

Follow-up to Article 8(j) of the *CBD*, which deals directly with indigenous

¹⁷¹ The Conference of the Parties (COP) to the *CBD* held an extra-ordinary meeting in Cartagena, Columbia and Montreal, Canada, and adopted a supplementary agreement to the *Convention* known as the *Cartagena Protocol on Biosafety* on 29 January 2000; The COP has also initiated work on five thematic work programmes with respect to marine and coastal biodiversity, agricultural biodiversity, forest biodiversity, the biodiversity of inland waters, and dry and sub-humid lands: See UN, *Convention on Biological Diversity*, online: <<http://www.biodiv.org/programmes/>> (last modified: 3 August 2001); To date the COP has held six ordinary meetings, and one extraordinary meeting (the latter, to adopt the *Biosafety Protocol*). From 1994 to 1996, the COP met annually. After 1996, the COP decided to meet every two years. To date the COP has made a total of 114 procedural and substantive decisions; see *Convention on Biological Diversity*, *supra* note 166.

issues, has included holding one workshop and establishing an inter-sessional working group to address the implementation of Article 8(j) and related provisions of the *Convention*.¹⁷² At its fourth meeting (May 1998), the COP reviewed the report from a 1997 workshop¹⁷³ and decided to establish an open-ended inter-sessional working group on Article 8(j).¹⁷⁴ The first meeting of the

¹⁷² Article 8(j): Traditional Knowledge, Innovations and Practices - Introduction, online: *Convention on Biological Diversity* <<http://www.biodiv.org/programmes/socio-eco/traditional/default.asp#>> (last modified: 4 April 2002); To date, the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) has met twice and held one workshop: "Article 8(j): Traditional Knowledge, Innovations and Practices Meetings and Documents," online, *Convention on Biological Diversity* <<http://www.biodiv.org/doc/default.asp?thm=art>> (last modified: 19 March 2002).

¹⁷³ *Report of the Workshop on Traditional Knowledge and Biological Diversity*, Madrid, 24-28 November 1997, UNEP/CBD/COP/4/10/Add.1; UNEP/CBD/TKBD/1/3, 15 December 1997 held in accordance with decision III/14 of the Conference of the Parties.

¹⁷⁴ The mandate of the inter-sessional working group on Article 8(j) was to:

- (a) To provide advice as a priority on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity;
- (b) To provide the Conference of the Parties with advice relating to the implementation of Article 8(j) and related provisions, in particular on the development and implementation of a programme of work at national and international levels;
- (c) To develop a programme of work, based on the structure of the elements in the Madrid report (UNEP/CBD/COP/4/10/Add.1) as set out in the annex to the present decision;
- (d) To identify those objectives and activities falling within the scope of the Convention; to recommend priorities taking into account the programme of work of the Conference of the Parties, such as the equitable sharing of benefits; to identify for which work-plan objectives and activities advice should be directed to the Conference of the Parties and which should be directed to the

inter-sessional working group, held in Seville, Spain in March 2000, focused discussion on several areas:

- application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities;
- implementation of Article 8 (j) and related provisions, in particular, the development and implementation of a programme of work at national and international levels;
- development of a programme of work on Article 8 (j) and related provisions of the CBD;
- priorities, opportunities for collaboration and implementation of the programme of work;
- measures to strengthen cooperation among indigenous and local communities at the international level.¹⁷⁵

The findings of the first meeting (that took place in February 2000) of the inter-sessional working group on Article 8(j) was reported to the Fifth COP

Subsidiary Body on Scientific, Technical and Technological Advice; to recommend which of the work-plan objectives and activities should be referred to other international bodies or processes; to identify opportunities for collaboration and coordination with other international bodies or processes with the aim of fostering synergy and avoiding duplication of work;

(e) To provide advice to the Conference of the Parties on measures to strengthen cooperation at the international level among indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity and make proposals for the strengthening of mechanisms that support such cooperation...

See UNEP, *Dec. on implementation of Art. 8(j) and related provisions*, UNEP/CBD/COP/4/9, 4th ord. mtg., Bratislava, Slovak Republic, 4-15 May 1998.

¹⁷⁵ *First Mtg. of the Ad Hoc Open-Ended Inter-Sessional Working Group on Art. 8(j)*, 27 - 31 March 2000 - Seville, Spain, online: *Convention on Biological Diversity* <<http://www.biodiv.org/doc/meeting.asp?wg=WG8J-01&thm=ART>> (last modified: 19 March 2002).

in Nairobi in May 2000.¹⁷⁶ The Fifth COP also discussed progress on the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*.¹⁷⁷ The *Protocol*¹⁷⁸ was originally developed in response to the COP recognizing the need to protect human health and the environment from the possible adverse effects of the products of modern biotechnology. The *Protocol* contains Article 26 that deals specifically with the socio-economic implications of biosafety for indigenous peoples:

1. The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.
2. The Parties are encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities.¹⁷⁹

¹⁷⁶ Report of the first mtg. of the Ad Hoc Open-ended Inter-Sessional Working Group on Art. 8(j) and Related Provisions of the Convention on Biological Diversity, CBD COP, Nairobi, 15-26 May 2000, UNEP/CBD/COP/5/5.

¹⁷⁷ UNEP, Dec. on Work plan of the Intergovernmental Committee for the Cartagena Protocol on Biosafety, UNEP/CBD/COP/5/1, 5th ord. mtg., Nairobi, Kenya, 15-26 May 2000.

¹⁷⁸ UNEP, Dec. EM-I/3, Adoption of the Cartagena Protocol and interim arrangements and annex, UNEP/CBD/COP/EM-I/3, 1st extra-ord. mtg., Cartagena, Colombia & Montreal, Canada, 22 - 23 February 1999 & 24 - 28 January 2000.

¹⁷⁹ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, online, UNEP <<http://www.biodiv.org/biosafety/protocol.asp>> (last modified: 29 October 2001); The Protocol was finalized and adopted in Montreal on 29 January 2000 at an extraordinary meeting of the CBD COP.

Trends within international environmental law appear to be influencing states to be more receptive to the concept of commonage (ie., the common heritage of mankind¹⁸⁰) as an organizing global policy framework.¹⁸¹ Henkin writes that the concept and law of commonage has long been with us (ie. seas, air space, moon, planets, outer space, polar regions), and international law is based on the principle that extraterritorial commonage is “everybody’s or nobody’s.”¹⁸² He adds “...increasingly, we are beginning to recognize a different commonage, a common heritage not in the earth’s resources but in the earth itself, in the global environment and in its preservation for future generations.”¹⁸³

The creation of a multilateral treaty on the environment (ie., *CBD*) illustrates states’ increasing receptivity to the value of respect for a common heritage and a commitment to a more cooperative approach for solving environmental degradation problems on an international scale. The *CBD* is significant as it is the first multilateral treaty on environment incorporating these values, and it includes provisions specific to indigenous peoples. However, for indigenous peoples, the normative approach to the *CBD* still

¹⁸⁰ Henkin, *supra* note 167 at 296.

¹⁸¹ Fourmile, *supra*, Chapter 2, note 6 at 296.

¹⁸² Henkin, *supra*, Chapter 2, note 6 at 296.

¹⁸³ *Ibid.*

reflects an anthropocentric perspective that conflicts with their normative approaches.

The concept of common heritage as reflected in the *CBD* is ostensibly similar to many indigenous normative conceptions of their relationship with the environment, with Mother Earth.¹⁸⁴ However, the reality that *CBD* is still firmly anchored within the normative conception of an anthropocentric regime of environmental protection is evidenced in the language and terminology used in the *CBD*. For instance, Principle 1 sets the tone that environmental initiatives are based on the normative conception that biological health is centered around ensuring the well-being of human beings first and foremost: "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."¹⁸⁵

For indigenous peoples, any approach to protection of the environment must be cognizant of the equal and symbiotic relationship between humans and the environment.¹⁸⁶ As biological diversity and cultural diversity are intimately related, any initiatives affecting biological diversity (through the form of environmental law initiatives) affects indigenous cultural

¹⁸⁴ See for eg. *Declaration of the Consultation Meeting Indigenous Peoples, Mother Earth and Spirituality* (San Jose, Costa Rica, 31 May 1996), online: The Earth Charter Initiative, International Secretariat, The Earth Council <http://www.earthcharter.org/report/special/indigenous_en.htm> (date accessed: 22 September 2001).

¹⁸⁵ *CBD*, *supra* note 166.

¹⁸⁶ See also *supra*, Chapter 2, note 93 and accompanying text.

diversity and cultural heritage.¹⁸⁷ Indigenous normative conceptions about the relationship between man and the environment can be characterized as being “ecocentric” as opposed to “eurocentric” or “anthropocentric.” Fourmile writes that:

Generally speaking, indigenous peoples worldwide have a view of the world which places them within the natural order in which all living things are inter-related and interdependent. Essential to this natural order is the notion of reciprocity: if you care for the land and the life it sustains, it will care for you. The Eurocentric division between ‘man’ and ‘nature’ as expressed in the original categories of the World Heritage Convention, ‘natural’ and ‘cultural’, is notably absent. Thus indigenous peoples’ world views could be characterized as being ecocentric, rather than technocentric. The latter view expresses the notion that nature exists to serve humanity and can be acted upon, owned, objectified, exploited, manipulated and understood through primarily scientific, and technological means. Similarly, where ecological or environmental problems arise these can be addressed through the application of the appropriate technology – the ‘technology fix’, as it were.¹⁸⁸

A second area of concern for indigenous peoples is related to the processes of negotiating and implementing the *CBD*. Indigenous peoples were minimally involved in the negotiating and drafting of the provisions that related to their concerns and interests in the *CBD*.¹⁸⁹ The rules of participation procedure under the *CBD* also restricts indigenous participation to that of

¹⁸⁷ See also *supra*, Chapter 2, notes 11 and 12 and accompanying text.

¹⁸⁸ Fourmile, *supra*, Chapter 2, note 6 at 219.

¹⁸⁹ *Review of existing UN mechanisms*, *supra* note 10 at para. 134.

observers or NGO's.¹⁹⁰ With respect to implementation, the UNEP reported in 1996 that it is carrying out its Article 8(j) implementation programme initiatives with "the full participation of indigenous and local communities in the planning and subsequent implementation and evaluation of any projects that are identified and funded."¹⁹¹ However indigenous peoples are still concerned about the processes of consultation and participation under the *CBD*. Consultations with indigenous peoples are being conducted on an ad hoc basis with the terms of reference being driven by the interests and concerns of the *CBD* Secretariat.¹⁹²

The creation of both hard law and soft law on protection of the environment and protection of indigenous knowledge and heritage under international environmental law has been a positive development. The *CBD* is a timely treaty that speaks to environmental degradation issues. The political and legal reality still exists however that the *CBD* was negotiated by states parties, and indigenous peoples were not able to participate equally in the negotiation of the provisions. Consequently, the treaty reflects an anthropocentric approach that is incompatible with an indigenous normative conception of environmental health.

¹⁹⁰ *Supra* note 254.

¹⁹¹ *Review of UN existing mechanisms*, *supra* note 166 at para. 93.

¹⁹² *Ibid.* at paras. 44 and 74.

The lack of indigenous political and legal status also impacted on the processes of implementation that were negotiated and included in the *CBD*. There is an unprecedented level of consideration of indigenous peoples' issues and participation at the international environmental policy level. However, indigenous peoples were not able to choose the issues of concerns and how they were to be addressed within their communities. The *CBD* provides for processes of participation and consultation; however, these processes are not systemic and are still being carried out on an *ad hoc* basis, as decided by external decision-makers such as the *CBD* Secretariat.¹⁹³

Many indigenous groups have chosen to interact vigorously with the processes opened up to them by the *CBD* and they are using these processes to continue to lobby for political and legal status to represent their own interests within an international forum. Their current strategy can be characterized as participating in current processes¹⁹⁴ in order to effect short-term remedies to environmental issues while continuing to lobby for their long-term transformative goals and objectives of achieving legal recognition as self-determining peoples with the right to control their internal affairs and to

¹⁹³ *Ibid.*

¹⁹⁴ Indigenous peoples have participation opportunities under the *CBD* and other UNEP initiatives.

regulate the impacts of external policies and laws such as international environmental policies and laws.¹⁹⁵

3.4.2 International Trade Law

Interdependence and globalization have also influenced a changing economic world order that is characterized by:

- 1) tradability of services, which follows from improvements in telecommunications and information processing technology;
- 2) sharp increase in the intellectual property content of both goods and services;
- 3) globalization of production; and
- 4) customization of production.¹⁹⁶

The trend of globalization is intricately connected with the trend of accelerated growth in human innovation through scientific and technological developments within this past half-century. Trends of globalization and rapid growth of human innovation appear to be influencing the nature of international commercial relationships between states with respect to protecting human expressions and innovations.

The traditional international system of regulating human expressions and innovations has been impacted by a number of trends as well. First of all,

¹⁹⁵ See Part VI of the Draft Declaration on the Rights of Indigenous Peoples that contains proposed international legal standards for controlling and regulating the impact of external policies upon indigenous lands, territories and resources; See also *supra* note 80.

¹⁹⁶ Smith, *supra*, Chapter 1, note 4.

there has been a trend toward privatization of research.¹⁹⁷ The private sector has come to play an increasingly predominant role in research and development, a role that was the primary responsibility of public bodies and institutions in the past. One reason for this trend may be that there are declining sources of public funding and therefore there is less research being driven by public interests. Another reason for this trend may be that the private sector (primarily in the form of transnational corporations) is acquiring public funds and is therefore dominating the research interests of publicly-funded projects. Finally, private bodies may simply have superior financial resources to dominate the research sector and agendas.¹⁹⁸ Rural Advancement Foundation International (RAFI) predicts that "if the present trends continue, by the end of the century close to half of all the intellectual property accruing to United States' universities and government agencies will be controlled by corporations on an exclusive access basis."¹⁹⁹ Dembo, Dias and Morehouse write that, within the area of intellectual property, privatization is a pervasive

¹⁹⁷ "Biotechnology and the Third World" *supra*, Chapter 2, note 77 at 439; Dembo *et al.* refer to the concept of privatization as relating to open or public access to a technology.

¹⁹⁸ *Conserving Indigenous Knowledge – Integrating Two Systems of Innovation -An Independent Study by the Rural Advancement Foundation International Commissioned by the United States Development Programme* (New York: RAFI, 1994) at 10 [hereinafter RAFI].

¹⁹⁹ *Ibid.*

issue that “relates to access, governmental privatization, product displacement, and special concerns relating to the rural poor.”²⁰⁰

It is important to note that although various trends are resulting in a changing economic world order, the nature of international relationships is still based on a “balance of power” framework that was originally introduced during the early colonial era of international relations. Tunkin writes that “[d]uring all the previous history, primary regulatory role in the inter-State system played power, especially military power and such a system is rightly called a balance of power system.”²⁰¹ Dhokalia expressed similar sentiments by stating that nation states of this era were characterized as divisive, with political relations being based on “narrow calculations of power, domination and rivalry.”²⁰² Schachter saw international law as the product of historical experience in which power and the “relation of forces” are determinants:

Those States with power (ie., the ability to control the outcomes contested by others) will have a disproportionate and often decisive influence in determining the content of rules and their application in practice. Because this is the case, international law, in a broad sense, both reflects and sustains the existing political order and distribution of power.²⁰³

²⁰⁰ “Biotechnology and the Third World,” *supra*, Chapter 2, note 77 at 439.

²⁰¹ G. Tunkin, “A New Political Thinking and International Law” in Pathak & Dhokalia, *supra* note 152 at 178.

²⁰² Dhokalia, *supra* note 152 at 212.

²⁰³ O. Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 6.

Although the presumption that equality was the defining feature of the international order and international law during the early colonial era of international law, it can be argued that in actuality, the defining feature was inequality because of varying degrees of power held by states.

Modern indications of unequal power relationships between states are illustrated by the North-South split between states with respect to access to biotechnology. Southern or “developing” states that are rich in raw genetic material (such as Brazil) are often not in the financial or technological position to finance and support scientific and technological product and process developments.²⁰⁴ Many developing states cannot participate in the fields of science and technology because the necessary investment of capital is simply not available for many of them. Northern or “developed” states have generally not been amenable to proposals of technology transfer between northern and southern states so as to provide for a more level playing field. They prefer the *status quo* of a free market economic order privileges their superior financial and technological position and power to dictate research interests, agendas and commercial benefits.

The trend towards privatization of research has also contributed to transnational corporations (TNC's) emerging as dominant players within the

²⁰⁴ “Biotechnology and the Third World” *supra*, Chapter 2, note 77 at 438.

fields of scientific research.²⁰⁵ There are two issues that have developed out of the emerging role of TNC's. First of all, their activities are difficult to regulate due to the fact that the international regimes have not caught up with the amorphous nature and power of their presence within the international context.²⁰⁶ Secondly, as a result of poor or non-existent international regulations, TNC's have flourished within the context of an international legal regime that is based on a "balance of power" framework. Therefore, their financial resources, as compared to developing states, have placed them within a superior bargaining position respecting their research activities within the borders of developing states and ability to protect the products of their research.

Within the current "balance of power" framework of international relations, relationships are characterized by inequality such as that between Northern and Southern states and between states and TNC's. A third unequal relationship is that between vulnerable groups such as indigenous peoples and states or with non-state entities such as TNC's. Indigenous peoples who are living within the borders of developing states face pressures from a state

²⁰⁵ *Ibid.* at 437.

²⁰⁶ J. Woodroffe, "Regulating Multinational Corporations in a World of Nation States" in M. Addo, ed., *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999) at 131-134.

government that is itself often operating within an inequitable power of relations and pressures from powerful developed states or TNC's.

In addition to the privatization trend, the international intellectual property regime is affected by the trend toward genetic engineering in biotechnology. For example, research developments in transgenics have made it possible for plants to utilize animal and insect genes, for one species to be a manufacturing source of genome for other species, and for medicines and foods to be merged into "nutraceuticals."²⁰⁷ The issue emerging from the second trend is the appropriate response of intellectual property regimes in terms of whether and how intellectual property rights can be created over life forms.²⁰⁸

The response of the international community to a changing world economic order (as indicated by the trends of globalization and interdependence) was to institute a round of trade talks between 1986-1994 that resulted in a full package of multilateral trade agreements called the *Final*

²⁰⁷ RAFI, *supra* note 198 at 11.

²⁰⁸ See D. Harry, "Patenting of Life and Its Implications For Indigenous Peoples" (January 1995) *IPF Info Sheet* #7 at 1; I.J. Churchill, "Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things" (July 1994) 8 *I.P.J.* 249-284; B. Hoffmaster, "Between the Sacred and Profane: Bodies, Property, and Patents in the *Moore* Case" (December 1991) 7 *I.P.J.* 114-148; N. M. Derzko, "Protecting Genetic Sequences under the Canadian *Copyright Act*" (December 1993) 8 *I.P.J.* 54-56; S. Crespi, "Biotechnology Patenting: the Wicked Animal Must Defend Itself" (1995) 9 *E.I.P.R.* 431-441.

Act - Uruguay Round.²⁰⁹ The *Final Act* created the World Trade Organization (WTO) and included at least 15 agreements covering a broad range of trade negotiation areas for states. A specific response by the international community to the growing issue of access to and protection of biotechnology was the *Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement*.²¹⁰

The 1994 GATT treaty provided for the establishment of the WTO to oversee the operation of the treaty and to create a forum for regular ministerial decision-making with respect to trade relations under the various agreements.²¹¹ The WTO's mandate included examining the interrelationships of trade and other areas. One example is the relationship between trade and the environment. It is important to note that negotiations of the *Uruguay Round of the GATT* and *CBD* had taken place concurrently.²¹² Developed states had been pressing for compulsory universal respect for patents issued to

²⁰⁹ *Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, Legal instruments embodying the results of the Uruguay Round*, 14 April 1994, Marrakesh, Vol. 1, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 31 May 2002) [hereinafter *Final Act Uruguay Round*].

²¹⁰ *Annex 1C Agreement on trade-related aspects of intellectual property rights of Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, Legal instruments embodying the results of the Uruguay Round*, 14 April 1994, Vol. 31 (1994) 33 I.L.M. 81, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 31 May 2002) [hereinafter *TRIPS Agreement*].

²¹¹ *Agreement Establishing the World Trade Organization*, *supra* note 209.

²¹² M. Blakeney, "The International Framework of Access to Plant Genetic Resources" in Blakeney, *supra*, Chapter 2, note 57 at 10.

developers of biotechnology in their trade negotiations.²¹³ The issue of compulsory licensing of patents threatened to break down negotiations between developed and developing states. United States subsequently proposed that “the GATT formulate legislative norms for intellectual property protection and that it require the introduction of a range of mechanisms for the enforcement of intellectual property rights.”²¹⁴ The *TRIPS Agreement* was created to regulate intellectual property rights in the trade context of promoting technological innovation and technology transfer and dissemination.²¹⁵ In response to the concerns of developing countries, *TRIPS* included Article 27.3 that permits developing countries to exclude from patentability:

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.²¹⁶

²¹³ *A Global Challenge, supra*, Chapter 2, note 39 at 185.

²¹⁴ Blakeney, *supra*, Chapter 2, note 57 at 10.

²¹⁵ *A Global Challenge, supra*, Chapter 2, note 39 at 186; The *TRIPS Agreement* was annexed to the *WTO Agreement* as a condition of membership.

²¹⁶ *Supra* note 209.

Article 65.2 also provided signatory developing countries a period of five years to comply with the *TRIPS Agreement*, commencing from the date of entry into force of the WTO Agreement (April 1994).²¹⁷

The *TRIPS Agreement* is perceived as having a profound effect on trade relations with respect to the global treatment of intellectual property rights (IPR's). Horton writes

For the first time, it establishes a floor of protection in all major areas of IPR and a ceiling for anti-IPR measures such as compulsory licensing and trademark conditions. It also sets minimum standards for civil and criminal penalties and associated judicial procedures. GATT Members have a strong incentive to join the TRIPS Agreement, since otherwise they face the withdrawal of trade concessions by other Members with whom they have multilateral agreements.²¹⁸

In recognition of the close relationships perceived to exist between trade relations, the environment and IPR's, the Ministers adopted a decision calling for the establishment of a Committee on Trade and Environment (CTE) when they adopted the *Uruguay Round Final Act* in 1994.²¹⁹ The General Council of the WTO established the CTE in January 1995, along with a work programme organized around ten items of trade and environment.²²⁰ The first

²¹⁷ *Ibid.*; Signatory least developed countries were permitted an additional five years for the implementation of the *TRIPS Agreement*.

²¹⁸ Horton, *supra*, Chapter 2, note 75 at 25.

²¹⁹ See *supra* note 209.

²²⁰ The decision states that the purpose of the CTE is to "(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development; (b) to make appropriate recommendations

meeting of the CTE was held in February 1995.²²¹ Among the ten items of discussion under its work programme, the Committee on Trade and Environment has examined the linkages between the *TRIPS Agreement* and other multilateral environmental agreements such as the *CBD*, particularly under Item 8 (*TRIPS* and the environment).²²² Indigenous peoples have been specifically discussed within these *TRIPS* and environment discussions taking place within WTO meetings.²²³

on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system”: WTO, General Council, *Minutes of Meeting* (held on 31 January 1995), WTO Doc. GC/M/1, online: WTO <http://docsonline.wto.org/GEN_searchResult.asp>(date accessed: 1 June 2002).

²²¹ WTO, Committee on Trade and Environment, *Report of the Meeting held on 16 February 1995 – Note by the Secretariat*, WTO Doc. WT/CTE/M/1 (6 March 1995), online: WTO <http://docsonline.wto.org/GEN_searchResult.asp> (date accessed: 1 June 2002).

²²² WTO, *Environment: Trade and Environment News Bulletin*, TE/004 – 14 August 1995, online, World Trade Organization <http://www.wto.org/english/tratop_e/envir_e/te004_e.htm> (date accessed: 24 February 2002).

²²³ For instance, at the first CTE meeting on Item 8 held in June 1995, several representatives discussed *TRIPS* provisions as they related to indigenous knowledge. The delegation from India raised the issue of Article 27.3(b) of *TRIPS* within the context of protecting traditional plant varieties. The representative of Malaysia raised social justice and equity concerns with respect to the IPR system favoring corporations involved in genetic engineering initiatives and was not suited to recognizing or rewarding knowledge and innovation of the non-formal sector, such as farmers and indigenous peoples whose knowledge of crops and medicinal plants had been the basis for much of the development in agriculture and medicine. The representative also raised ethical and moral concerns surrounding the appropriateness of patenting life forms and concluded by stating that

In her 1993 *study on protection of the intellectual and cultural property rights of indigenous peoples*, Madame Daes noted the dynamics of inequitable international trade negotiations and the success of industrialized countries (such as United States) in pressing for an intellectual property regime that favors the interests of developed states.²²⁴ Developing states and farmers' organizations have expressed concerns that such a regime will only reinforce TNC's ability to control the medicines and genetically-engineered plants that they are devising with genetic resources collected in the South.²²⁵ Madame Daes states that the interests of most indigenous peoples are aligned with those of developing countries.²²⁶ She noted in her 1995 *Final Report* that

The rapid expansion of regional trading blocks in the Americas and South-East Asia and the intellectual property provisions of the Uruguay Round of GATT will facilitate and

discussions in scientific, philosophical, religious and ethical fora should be considered in the Committee's deliberations on the *TRIPS Agreement* in the context of trade and environment. The question of the potential use of IPR's in protecting indigenous knowledge and practices was briefly canvassed and Australia's representative concluded by noting that Article 27.3(b) of the *TRIPS Agreement* had particular environmental and indigenous relevance and merited informed Committee debate on the relationship between the *TRIPS Agreement*, the environment and sustainable development.: See WTO, *Committee on Trade and Environment – Report of the Meeting Held on 21-22 June 1995 – Note by the Secretariat*, WTO Doc. WT/CTE/M/3 (18 July 1995), online, WTO <http://docsonline.wto.org/GEN_searchResult.asp> (date accessed: 31 May 2002).

²²⁴ *Supra*, Chapter 2, note 20 at para.152.

²²⁵ *Ibid.*; See also *A Global Challenge*, *supra*, Chapter 2, note 39 at 186.

²²⁶ *Supra*, Chapter 2, note 20 at para. 152.

accelerate the acquisition of patents to indigenous peoples' knowledge by biotechnology firms in the North.²²⁷

In light of indigenous concerns, the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples consequently contain a section of recommendations on regulating the activities of business and industry.²²⁸

In her 1996 *Supplementary Report*, Madame Daes pointed out some positive implications of the recent trade agreements. With respect to the *TRIPS Agreement*, she stated that Articles 1 and 8:

...[P]ermit Member States to give greater protection to the heritage of indigenous peoples under their national legislation, than they are required to give to intellectual property generally – provided they afford the same special protection to indigenous peoples who are nationals of other States. Moreover, article 27 appears to permit Member States, if they so wish, to exclude the traditional ecological and medical knowledge of indigenous peoples from patentability. Hence States could implement the Principles and Guidelines for Protection of the Heritage of Indigenous Peoples, consistent with their obligations under the TRIPS Agreement.²²⁹

²²⁷ *Final Report on protection of heritage, supra*, Chapter 2, note 78 at para. 23.

²²⁸ *Ibid.* at paras. 40-45.

²²⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people, Supplementary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted pursuant to Sub-/Commission res. 1995/40 and Commission on Human Rights Res. 1996/63*, UN Doc. E/CN.4/Sub.2/1996/22 (24 June 1996) at para. 49, online: UN <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c6646bc7fe89406f802566c0005cd3f0?OpenDocument>> (date accessed: 16 February 2002) [hereinafter *Supplementary Report*].

Madame Daes also views Article 39.2 of the *TRIPS Agreement* as potentially providing broad protection of secret indigenous knowledge that has commercial value, even if it is not eligible for copyright or patent protection. The concept of secret knowledge is broad enough to “cover most of the teachings, ceremonies, songs, dances and designs that indigenous peoples consider sacred and confidential and are current threatened by commercial exploitation.”²³⁰ Madame Daes noted with approval the position of the Executive Secretary of the *CBD* that “recognizing the rights of indigenous people to their traditional knowledge is needed to reconcile existing international instruments in the fields of trade, the environment and human rights.”²³¹

Indigenous peoples have been increasingly concerned about the implications of recent regional and international trade agreements. In 1994, the Mapuche Nations organization Aukin Wallmapu Ngulam (Consejo de Todas las Tierras) convened a conference in Chile to evaluate indigenous responses of the consequences of the regional *North American Free Trade Agreement*. Indigenous peoples from Chile, Argentina, Peru and Mexico adopted a declaration condemning the accelerated usurpation and patenting of indigenous peoples’ knowledge by TNC’s as facilitated by regional trading

²³⁰ *Ibid.* at paras. 50 and 51.

²³¹ *Ibid.* at para. 53.

agreements.²³² The Temuco-Wallmapuche Declaration underscored indigenous peoples' sense of urgency for the necessity of immediate international action in order to protect their heritages from further exploitative activities by commercial interests such as TNC's.

Indigenous peoples also have many concerns about the GATT and the international trade regime as well. In Seattle, at the Third Ministerial Meeting of the World Trade Organization on November 30-3 December 1999, indigenous peoples convened their own meetings to discuss GATT and its effects. The Seattle Declaration contained some of the major points of indigenous concern with "how the GATT and the World Trade Organization are destroying Mother Earth and her cultural and biological diversity." The main points highlighted were:

- inherent right to self-determination, treaties and other constructive agreements are undermined by most of the WTO Agreements;
- disproportionate impact of these Agreements on indigenous communities, whether through environmental degradation or the militarization and violence that often accompanies development projects;
- The WTO Agreement on Agriculture (AOA), which promotes export competition and import liberalization, has allowed the entry of cheap agricultural products into indigenous communities, causing the destruction of ecologically rational and sustainable agricultural practices of indigenous peoples;

²³² *Final Report on protection of heritage, supra*, Chapter 2, note 78 at para. 16.

- mining laws in many countries are being changed to allow foreign mining corporations to displace indigenous peoples from their ancestral territories. These large-scale commercial mining and oil extraction activities continue to degrade indigenous lands and fragile ecosystems;
- theft and patenting of indigenous biogenetic resources is facilitated by the TRIPs (Trade-Related Aspects of Intellectual Property Rights) of the WTO (eg. Article 27.3b of the TRIPs Agreement);
- the liberalization of investments and the service sectors, which is pushed by the General Agreement of Services (GATS), reinforces the domination and monopoly control of foreign corporations over strategic parts of the economy. The World Bank and the International Monetary Fund impose liberalization, deregulation and privatization on countries caught in the debt trap. These conditionalities are reinforced further by the WTO; and
- the WTO Forests Products Agreement promotes free trade in forest products. By eliminating developed country tariffs on wood products by the year 2000, and developing country tariffs by 2003, the Agreement will result in the deforestation of many of the world's ecosystems in which indigenous peoples live.²³³

Within a “balance of power” framework of international relations²³⁴, the question becomes whose interests will be reflected and promoted within the trade agreements. The political and legal reality of the current international trade regime is that it is still based on a “balance of power” framework of international relations that was instituted during the early years

²³³ Indigenous Peoples’ Seattle Declaration (Third Ministerial Meeting of the World Trade Organization, Seattle, Washington State, USA, 30 November – 3 December 1999); online: Corpwatch <<http://www.corpwatch.org/trac/corner/worldnews/other/527.html>> (date accessed: 22 September 2001).

²³⁴ See *supra* note 201 and accompanying text.

of colonization. As the regime is based on agreements forged between states, the interests of more powerful states have been the driving force behind the trade agreements.²³⁵

Within a “balance of power” framework of trade relations between northern and southern states, the position and interests of TNC’s have aligned with the interests of more powerful states.²³⁶ Whereas, the position and interests of vulnerable groups such as indigenous peoples have aligned with less powerful developing states.²³⁷ Since the trade regime favors the position and interests of more powerful entities, it has resulted in an inequitable relationship between non-state entities such as TNC’s and indigenous peoples.²³⁸ Consequently, indigenous peoples have been experiencing great difficulties in controlling and regulating the harvesting and product development activities of TNC’s within their lands, territories and human genome, particularly within a trade context that facilitates the transfer of their biodiversity out of their lands and territories.

The fact that the *GATT* was negotiated and signed by states parties reflects the lack of indigenous peoples’ status and presence at the international trade talks. Consequently, the international trade agreements do not reflect

²³⁵ See *supra* note 204 and accompanying text.

²³⁶ See *supra* note 224 and accompanying text.

²³⁷ See *supra* note 226 and accompanying text.

²³⁸ See *supra* note 227 and accompanying text.

their normative approaches, interests and concerns. The lack of indigenous political and legal status is also reflected in the processes of trade agreement implementation. While the *GATT 1994* provides for processes of participation and consultation, these processes are exclusive to Member States. Once again, indigenous peoples must rely upon third parties such as states to represent their positions, interests and concerns.

In her *Report on the Technical Meeting on the Protection of the Heritage of Indigenous People*, Madam Daes made reference to the WTO CTE working paper that reviewed the *TRIPS Agreement* and its relation to the environment²³⁹. She noted the argument presented within the context of the working paper that "Paragraphs 77 and 78 of the working paper, which included references to indigenous peoples and local communities, stated that the *TRIPS Agreement* was not an obstacle to enhancing the protection of indigenous intellectual property rights."²⁴⁰ The technical experts noted several avenues of protection for indigenous peoples. For instance, Article 27.3 of the *TRIPS Agreement* provided for a review of the agreement after the date of entry into force of the *Agreement*, and that WTO member States could resort to existing mechanisms of intellectual property protection in order to cover indigenous knowledge, provided that the provisions of the *TRIPS Agreement*

²³⁹ WTO Doc. WT/CTE/W/8 (8 June 1995).

²⁴⁰ *Supra*, note 141 at para. 8.

were not contravened.²⁴¹ For indigenous peoples, the avenues of redress are still contingent upon on the will of states to press their positions, interests and concerns within the international trade fora and within domestic policy and laws. In preparing her 1996 *Supplementary Report on the Protection of the heritage of indigenous people*, Madame Daes reported the WTO communication that it had not undertaken any activities or initiatives relating to indigenous peoples:

In a letter dated 27 February 1996, the World Trade Organization stated that it “has not undertaken any activity related to this issue, which is not within its area of responsibility, and we therefore have no contribution to offer”.²⁴²

Unlike the opportunities presented by the *CBD*, the *GATT* regime does not present participation opportunities for indigenous peoples. The current strategy of indigenous groups with respect to influencing international trade policy and law affecting their indigenous knowledge and heritage has been limited to political protests at WTO meetings and lobbying within other international fora on trade issues affecting them.

3.4.3 International Intellectual Property Law

The historical development of the concept and regimes of intellectual property evolved in step with European colonization. Continuous advancements and inventions in European science and technology throughout

²⁴¹ *Ibid.*

²⁴² *Supra* note 229 at para. 6.

the colonization eras contributed to a growing perceived need to protect individual property interests in science and technology. Bently and Sherman write that intellectual property was not accepted as a distinct form of property until late in the eighteenth century.²⁴³ Since then, it has been used for almost one hundred and fifty years to regulate rights in the creation, use, and exploitation of mental or creative labour.

Intellectual property comprises a range of different titles and forms of protection²⁴⁴ that are characterized by the granting of certain time-limited rights over the control or use made of intellectual property products.²⁴⁵ Under Article 2 of the *Convention establishing World Intellectual Property Organization (WIPO)*, intellectual property covers rights relating to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,
- and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.²⁴⁶

²⁴³ L. Bently and B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2001) at 1.

²⁴⁴ Simpson, *supra*, Chapter 2, note 94 at 67.

²⁴⁵ WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (Geneva: WIPO, Publication No. 489, 2001) at par. 1.2.

²⁴⁶ *Convention Establishing the World Intellectual Property Organization*, 1967, Article 2 (viii).

Within European-based normative frameworks, the basic role and function of the intellectual property regime was to protect both private property rights and promote public rights of access to socially valued resources through a fine balancing exercise:

The right to development and intellectual property represents a balancing of the private right of the creator or inventor to protection of his intellectual property against the right of the community to enjoy the benefits of the sum of human art and knowledge. Domestic laws and international treaties on intellectual property, for the most part, protect the creator's private right.²⁴⁷

Intellectual property rights have always been primarily developed, enacted and enforced at the national level.²⁴⁸ Beginning in the nineteenth century, international protection of intellectual property was in the form of bilateral agreements between states.²⁴⁹ As scientific development and technologies increased, bilateral agreements were replaced by international conventions.²⁵⁰

²⁴⁷ Commission on Human Rights, *The Right of Everyone to Own Property Alone As Well as in Association with Others*, Study by L. Rodriguez, UN ESCOR, 1992, UN Doc. E/CN.4/1993/15 (18 December 1992).

²⁴⁸ Bently, *supra* note 243 at 4.

²⁴⁹ *Ibid.* at 5.

²⁵⁰ *Paris Convention for the Protection of Industrial Property* in 1883, the *Berne Convention for the Protection of Literary and Artistic Works* in 1886.

In 1967, the World Intellectual Property Organization (WIPO) was created through treaty²⁵¹ and was established as the UN specialized agency responsible for the promotion of the global protection of intellectual property through cooperation among States and, where appropriate, in collaboration with any other international organization²⁵², and for the administration of the various multilateral treaties dealing with intellectual property.²⁵³ In 1994, WIPO's exclusive domain was altered by the creation of the World Trade Organization (WTO),²⁵⁴ an international organization with a mandate that included administering trade related aspects of intellectual property within one of the GATT treaties: ie., the *TRIPS Agreement*²⁵⁵.

Up until Madame Daes' reports on the topic of indigenous peoples' heritage to the Human Rights Commission, WIPO maintained that its mandate did not include the topic of protection of the heritage of indigenous peoples. As late as 1995, WIPO maintained this position and requested that references to WIPO be deleted from the draft principles and guidelines for the protection of indigenous heritage prepared by the Special Rapporteur.²⁵⁶ By the time of the submission of the 1996 *Supplementary Report* however, WIPO had changed

²⁵¹ Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979.

²⁵² *Supra* note 246 at Art. 3(i).

²⁵³ *Ibid.* at Art. 4.

²⁵⁴ See *supra* note 209 and accompanying text.

²⁵⁵ See *supra* note 208 and accompanying text.

²⁵⁶ *Final Report on protection of heritage*, *supra*, Chapter 2, note 78 at para. 12.

its position and indicated that it was now going to jointly organize an international symposium with UNESCO on the preservation and legal protection of folklore (that were to presumably cover issues related to protection of indigenous heritage).²⁵⁷ In April 1997, WIPO jointly hosted the World Forum on the Protection of Folklore with UNESCO in Thailand, and the forum was seen as a watershed in both WIPO's and UNESCO's acknowledgement that the question of the protection of the heritage of indigenous peoples was within both their mandates.²⁵⁸

The 1998-1999 biennium was the beginning of WIPO's systemic response to meeting emerging global issues relating to genetic resources and traditional knowledge. As part of its background for its Program and Budget, WIPO outlined three challenges facing the intellectual property system in a rapidly changing world:

...accelerating technological advancement has created new global issues impacting on the intellectual property system; integration of the world economical, ecological, cultural, trading and information systems requires more active exploration of intellectual property issues at a global level complementing WIPO's national and regional activities; and the pervasiveness of intellectual property in the fabric of human activity and aspiration, and the universal character of IPRs, call for exploration of new ways in which the intellectual

²⁵⁷ *Supra*, note 229 at paras. 5 & 54.

²⁵⁸ Simpson, *supra*, Chapter 2, note 94 at 167.

property system can serve as an engine for social, cultural and economic progress for the world's diverse populations.²⁵⁹

In the 1998-1999 biennium, WIPO expressly identified one objective as "To identify and explore the intellectual property needs and expectations of new beneficiaries including the holders of traditional knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development."²⁶⁰ The Main program identified four stress points where rapid technological and social changes were exerting stress on the existing intellectual property system; and identified WIPO's tasks in considering how these stress points should be explored and addressed, in order to ease pressures and to advance the system:

- 11.1 IPR for New Beneficiaries;
- 11.2 Biological Diversity and Biotechnology;
- 11.3 Protection of Expressions of Folklore; and
- 11.4 IPR Beyond Territoriality.²⁶¹

WIPO's subprogram 11.1 (IPR for New Beneficiaries) outlined its mandate and set of activities relating to "the intellectual property needs and expectations of new beneficiaries including the holders of traditional

²⁵⁹ WIPO, *Program and Budget of WIPO: 1998-1999*, online: World Intellectual Property Organization <http://www.wipo.int/eng/document/govbody/wo_gb_ab/budget.htm> (date accessed: 10 June 2000).

²⁶⁰ *Ibid.*

²⁶¹ WIPO, *Main Program 11*, online: World Intellectual Property Organization <http://www.wipo.int/eng/document/govbody/wo_gb_ab/prg11.htm> (date accessed June 10 2000).

knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development.”²⁶² WIPO stated that it had been called upon by various international agencies and forums to

...provide technical advice and information on intellectual property matters where these arise in relation to certain groups which have had little or no effective access to the intellectual property system, for instance the United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) and the Conference of the Parties to the Convention of Biological Diversity (Workshop on Traditional Knowledge and Biological Diversity)...Other international undertakings require enhanced international cooperation to promote intellectual property protection in relation to such groups, notably in the Rio Earth Summit (Chapter 26 of Agenda 21) and the Convention on Biological Diversity (Article 8(j)).²⁶³

The work of WIPO in the 1998-99 biennium focused on issue-identification, fact-finding, research and consultation in preparation for its responsibilities of setting new directions for global intellectual property policy and law. WIPO identified six main activities through which it proposed to carry out its tasks with respect to intellectual property rights for new beneficiaries including the holders of indigenous knowledge and innovations.²⁶⁴ Tasks specifically related to issues affecting indigenous peoples included conducting nine fact finding missions to various regions of the world

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

for the purpose of identifying the intellectual property needs and expectations of holders of traditional knowledge and hosting two round-tables on the topic of Intellectual Property and Traditional Knowledge. The *Final Report* from the fact-finding missions acknowledged “while the needs of TK [traditional knowledge] holders have been referred to in other international fora, there has been to date no systematic global exercise by international organizations to document and assess, first-hand, the IP-related [intellectual property] needs of TK holders.”²⁶⁵

WIPO fact-finders focused on traditional knowledge holders as the intended beneficiaries of their work. From WIPO’s perspective, traditional knowledge is a subset of the broader concept of heritage, and indigenous knowledge was a subset of traditional knowledge.²⁶⁶ Traditional knowledge holders were defined as “all persons who create, originate, develop and practice traditional knowledge in a traditional setting and context.”²⁶⁷ WIPO emphasized that indigenous communities, peoples and nations are traditional knowledge holders, but not all traditional knowledge holders are indigenous; therefore, its intended beneficiaries included indigenous peoples as part of a larger body of traditional knowledge holders.

²⁶⁵ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (Geneva: WIPO, April 2001), at 5.

²⁶⁶ *Ibid.* at 23.

²⁶⁷ *Ibid.* at 26.

The WIPO *Final Report* uses the following definition of traditional knowledge that conforms closely with their mandate of promoting IPR's in creations of the human mind under Article 2(viii) of the *Convention Establishing the World Intellectual Property Organization*, 1967:

...refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and movable cultural properties.²⁶⁸

From WIPO's perspective, traditional knowledge does not include such items as human remains, languages in general and "cultural heritage" in the broad sense. In their Summary, Reflections and Conclusions, many fact finding mission informants (a number of which were indigenous peoples) disagreed and stated that the definition of traditional knowledge should include certain

²⁶⁸ *Ibid.* at 25.

forms that currently fell outside the scope of potential intellectual property subject matter: spiritual beliefs, dispute-resolution processes and methods of governance, languages, human remains, and biological and genetic resources in their natural state, knowledge or information per se.²⁶⁹

In its 2000-2001 Program and Budget,²⁷⁰ WIPO moved beyond issue identification by focusing on conceptual issues and testing practical solutions for the protection of traditional knowledge. Proposed activities included exploring and developing ways in which the IP system (including ancillary mechanisms and practices) can provide appropriate and equitable protection to indigenous and traditional communities.²⁷¹ Technical training support for holders of traditional knowledge would take place through “the development of practical training and information materials, practical training workshops for TK holders and others on the IP system, training on IP processes for the documentation of TK, compilation and publication of lessons to be learned from case studies in which TK protection has been sought under the IP system.”²⁷²

²⁶⁹ *Ibid.* at 216.

²⁷⁰ WIPO, 2000-2001 Program and Budget, online: World Intellectual Property Organization <http://www.wipo.int/about-wipo/en/index.html?wipo_content_frame=budget.html> (date accessed: 24 September 2001).

²⁷¹ *Ibid.*

²⁷² Permanent Forum on Indigenous Issues, *Review of Activities of the United Nations System Relating to Indigenous Peoples: An Interactive Discussion -*

At its Twenty-Sixth (12th Extraordinary) General Assembly held from September 25 to October 3, 2000, Member States established a special body to discuss intellectual property issues related to genetic resources, traditional knowledge and folklore.²⁷³ The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has since held three sessions in Geneva, focusing on three primary themes in its discussions:

- (i) access to genetic resources and benefit sharing;
- (ii) protection of traditional knowledge , whether or not associated with those resources; and
- (iii) the protection of expressions of folklore.²⁷⁴

Information received from the United Nations system, World Intellectual Property Organization, UN Doc. E/CN.19/2002/2/Add.1 (8 April 2002) at para. 6.

²⁷³ WIPO, General Assembly, *Report Adopted by the Assembly*, WIPO Doc. WO/GA/26/10 (3 October, 2000), online: WIPO <<http://www.wipo.int/globalissues/igc/documents/index.html>> (date accessed: 26 July 2002).

²⁷⁴ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (First Session), (Geneva, 30 April to 3 May, 2001), online: World Intellectual Property Organization <<http://www.wipo.int/eng/meetings/2001/igc/document.htm>> (date accessed: 24 September 2001); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Second Session), (Geneva, 10 December to 14 December, 2001) online: World Intellectual Property Organization <http://www.wipo.int/eng/meetings/2001/igc/document_2.htm> (date accessed: 26 July 2002); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Third Session), (Geneva, 13 June to 21 June, 2002), online: World Intellectual Property Organization <http://www.wipo.int/eng/meetings/2002/igc/index_3.htm> (date accessed: 26 July 2002).

To date, discussions at the IGC have concentrated on discussing the concept of traditional knowledge, compiling sources of information on traditional knowledge, gathering information from Member States on existing international and state mechanisms of protection of traditional knowledge, and reviewing preliminary proposals of new and revised mechanisms of protecting traditional knowledge under the international intellectual property regime.²⁷⁵

In its 2002-2003 biennium, WIPO noted intellectual property issues of global significance were first formally addressed in the WIPO Program and Budget in the 1998-1999 biennium. Since that year, global issues related to intellectual property have continued to grow in range and number. Member States identified that a holistic approach to issues in the four identified areas was needed as these issues cut across the entire intellectual property framework and current practices of Member States in policy areas such as economics, trade, cultural development, environment, science and technology, employment, and enterprise competitiveness.²⁷⁶ WIPO therefore decided to consolidate all global intellectual property issues under a comprehensive special program (Main Program 10) dedicated to the exploration and

²⁷⁵ See documents referred to in note 274.

²⁷⁶ WIPO, *Program and Budget of WIPO: 2002-2003* at par. 153, online: World Intellectual Property Organization <<http://www.wipo.int/about-wipo/en/index.html>> (date accessed: 26 July 2002).

promotion of new intellectual property concepts, strategies and issues. Main

Program 10 covers four areas:

- (i) genetic resources, traditional knowledge and folklore;
- (ii) small and medium-sized enterprises (SMEs) and intellectual property;
- (iii) electronic commerce and intellectual property; and
- (iv) intellectual property enforcement issues and strategy.²⁷⁷

The sub-program under Main Program 10.1 (Genetic resources, traditional knowledge and folklore) focuses on providing support to the deliberations of the IGC in two areas: (i) intellectual property and traditional knowledge and folklore, and (ii) intellectual property and access to and benefit-sharing in respect of biotechnology, biodiversity and genetic resources. Besides providing technical assistance and information to “Member States, custodians of genetic resources, holders of traditional knowledge and folklore, other stakeholders, and the concerned units of the Secretariat,” sub-program 10.1 would address certain issues relating to the “role of intellectual property in the preservation, conservation and dissemination of biological diversity and in related questions concerning the legal protection of biotechnological inventions not covered by the IGC.”²⁷⁸

Within the last decade, WIPO Member States have recognized the growing implications and challenges of biotechnology advances and genetic

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* at para. 158.

resources upon economics, trade and intellectual property concepts and mechanisms of protection on a global scale. The changing organizational approach of WIPO to its duties and activities reflects the growing international recognition of the interrelationship between biotechnology advances, genetic resources, traditional knowledge and intellectual property. For indigenous peoples, the reality of the international intellectual property system is that WIPO serves the needs and interests of Member States. Therefore, the timing, nature, issue identification, and cause and effect relationships of emerging issues has been conducted in exclusive response to the perspectives and agendas of Member States.

Indigenous peoples, once again lacking the international status necessary to have a voice within the WIPO regime, have had no participation or input into the terms of existing IP treaties or the articulation of emerging global intellectual property policies. As with other international organizations, most indigenous groups reject having to be approved by Member States as non-governmental organizations in order to participate in WIPO meetings as observers.

Like other international organizations, WIPO's conceptual approach to emerging global issues naturally reflects a state-centered agenda (driven as it is by Member States). The relationship between biotechnology advances, genetic resources and traditional knowledge was originally identified within the

context of Member States' discussions at WIPO General Assemblies. Member states' (and therefore WIPO's) approach to traditional knowledge conceptualizes indigenous knowledge as merely a subset of traditional knowledge, not as an area worthy of distinct treatment. Therefore, although indigenous peoples have positive opportunities to have their traditional knowledge needs and interests addressed within WIPO, WIPO responses are limited to those available to traditional knowledge holders as a whole.

Indigenous peoples also experienced the positive development of being among the beneficiaries consulted by WIPO fact-finding missions ascertaining the needs of traditional knowledge holders in 1998-1999; therefore, their needs and interests formed part of the information base used to identify issues and concerns of traditional knowledge holders. WIPO's response to the need to address the needs and interests of traditional knowledge holders was to inventory and assess currently existing international and national regimes and mechanisms of protection. Although WIPO's initiatives are positive developments, they have been lacking indigenous participation in identifying issues, conceptualizing the issues, and assessing existing systems of protection. The indigenous perspective and position with respect to responding to traditional knowledge needs and interests is still being driven and carried out by third parties, ie. Member states and non-governmental organizations.

The establishment of the IGC has also been a positive development. Once again, however, participation is limited to Member States and accredited non-governmental organizations. A number of indigenous groups however have taken advantage of the opportunity to participate, even within such a limited capacity. The work of IGC has promising implications, particularly in terms of examining *sui generis* mechanisms of protecting traditional knowledge under the existing international intellectual property regime.

While indigenous peoples have been able to successfully lobby to have sections dealing specifically with their issues included within the major international environmental treaty (CBD), they have not had similar opportunities with international IP treaties. Indigenous peoples have had to rely on existing IP treaties and their processes as potential sources of protection of their heritage and knowledge. International IP law as a potential source of protection of indigenous heritage and knowledge is useful in the short-term as a response to immediate and immense pressures on the integrity and viability of indigenous heritages. The international IP system is also seen as potentially useful in the long-term if *sui generis* systems of protection under the existing IP regime can be implemented. However, indigenous peoples are still reluctant to commit wholeheartedly to pursuing protection of their heritage and knowledge under a regime that approaches heritage and knowledge as

concepts of property, when such concepts are fundamentally incompatible with indigenous worldviews and systems. Henderson writes:

It has along been recognized that existing national and international intellectual and cultural property laws are not always compatible with Indigenous peoples' concerns for protecting their knowledge and heritage. In general, the overarching challenge in protecting Indigenous knowledge and heritage is negotiating with the modern concept of property. Most Eurocentric legal thought believes that all thought should be treated as a commodity in the artificial market. In contrast to Eurocentric thought, almost all Indigenous thought asserts that property is a sacred ecological order and manifestations of that order should not be treated as commodities...²⁷⁹

3.4.4 International Cultural Property Law

The international legal protection of cultural property was originally developed within the context of European warfare. European powers agreed to refrain from destroying objects of aesthetic or religious value during war or else they justified their actions of taking cultural objects on various grounds.²⁸⁰ For instance, France became one of the most notorious examples of the latter by justifying its appropriation of other nations' art on the grounds that: "France as the center of liberty and enlightened thought, saw herself as the natural repository for the cultural treasures of conquered states."²⁸¹ When France

²⁷⁹ *A Global Challenge, supra*, Chapter 2, note 39 at 145; For a more in-depth discussion of indigenous concerns with the European intellectual and cultural property concepts see Chapter 3.3.3.

²⁸⁰ Pask, *supra*, Chapter 2, note 39 at 65.

²⁸¹ Graham, *supra*, Chapter 2, note 42 at 756.

surrendered at the Congress of Vienna in 1815, states justified overturning otherwise valid treaties by pointing out they had agreed to such treaties with Napoleon under duress and on the further grounds that the "connection of cultural objects to their territory of origin by ties alike of sovereignty and artistic heritage."²⁸²

Between 1814 and the First World War, treatment of cultural objects within the context of warfare was dealt with through a regime of international conventions and protocols.²⁸³ The principle of respect for state sovereignty was affirmed in terms of not allowing interference with the cultural property of nation states. At the same time however, the doctrine of "integrity of collection" was introduced to ensure that a collection taken from one nation and incorporated into the state collection of another, could be withheld from

²⁸² *Ibid.*

²⁸³ See Article 56 of the *Hague Conventions II and IV of 1899 and 1907, Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899 and 18 October 1917: "Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

repatriation on the ground that it now formed a “unity of collection” with the second state’s holdings and therefore now belonged to the second state.²⁸⁴

Between the World Wars, the protection of cultural property protection was expanded to include peacetime protection.²⁸⁵ After the Second World War, the concept of cultural property became increasingly contentious. The UN Educational, Scientific and Cultural Organization (UNESCO) was established in 1945 to provide protection of “the common cultural heritage of all nations” through providing policy direction and administration of UN treaties with respect to cultural property and heritage issues between states. Under the auspices of UNESCO, several post-War conventions were negotiated and ratified.²⁸⁶

By the passage of the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*²⁸⁷, the definition of cultural property was amended to include a state designation, and by the passage of the 1970

²⁸⁴ S. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, NY: Oceana Publications, 1978) at 760.

²⁸⁵ See Graham, *supra*, Chapter 2, note 42 at 762-4.

²⁸⁶ See Conventions and Agreements of a Standard-Setting Nature adopted under the auspices of UNESCO solely or jointly with other International Organizations, [online: UNESCO <http://www.unesco.org/general/eng/legal/convent.shtml>](http://www.unesco.org/general/eng/legal/convent.shtml) (last modified: 15 March 2002).

²⁸⁷ *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols*, (1956) 249 U.N.T.S. 240, reprinted in Williams, *supra* note 284 at 203.

*Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*²⁸⁸, the definition was expanded beyond the works of artistic merit that had formed the definitional basis of earlier agreements. For the purposes of the 1970 *Convention*, the term "cultural property" meant property that was specifically *designated by each State* (emphasis mine) as being important for archaeology, prehistory, history, literature, art or science on the basis of religious grounds²⁸⁹. The object must also fall within one of the enumerated categories: products of archaeological excavations, objects of ethnological or artistic interest, archival material and antiquities more than 100 years old. Article 4 also includes cultural property created by nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory.²⁹⁰

The 1970 *Convention* provides two main mechanisms for the protection and recovery of cultural property. A State party can request other State parties to impose emergency import controls on an object or class of objects. A State

²⁸⁸ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, (1971) 10 I.L.M., reprinted in Williams, *supra* note 284 at 224.

²⁸⁹ *Ibid.*, Article 1.

²⁹⁰ *Ibid.*, Article 4.

party can also request the return of illegally-exported objects under certain conditions, at the expense of the State making the request.²⁹¹

Madame Daes points out several shortcomings of these *Conventions*: only Member States can make claims, both states involved in a dispute must be parties to the *Convention*, and the removal of the object must have occurred after the *Convention* came into force in both States (ie., after 1972).²⁹² These shortcomings are detrimental for the interests of indigenous peoples. First and foremost, it is states that designate what is cultural property. Under international treaties protecting cultural property, States are beneficiaries. Within the international context, states have to rely on treaties to regulate disputes over cultural property. States, therefore, have to rely on other states being signatories to various treaties in order to have recourse in disputes over cultural property. For instance, most of the largest art-importing States (such as France, Germany, Japan and the United Kingdom) are not parties to the 1970 *Convention*.²⁹³

Indigenous peoples have to rely on third party states to designate what is cultural property and to make claims of cultural property. What is of particular grievance for indigenous peoples is their lack of recourse for

²⁹¹ *Ibid.*; See also Madame Daes' comments in *Study on cultural and intellectual property rights of indigenous peoples, supra*, Chapter 2, note 20 at para. 123.

²⁹² *Ibid.* at para. 124.

²⁹³ *Ibid.*

recovery of the tremendous quantity of cultural property appropriated before 1972, during early eras of colonial takings of valuable cultural property.

In terms of indigenous participation within the UNESCO system, only officials appointed by the States are entitled to participate in the General Conference and the Executive Board meetings of UNESCO; although indigenous people are free to participate as observers in programme meetings if they wish.²⁹⁴ UNESCO reported that prior to the proclamation of the International Decade of the World's Indigenous People in December 1994, meetings on indigenous issues were not being systematically scheduled.²⁹⁵ Indigenous perspectives on cultural heritage issues were therefore not systematically included within UNESCO's work.

After the proclamation of the International Decade, UNESCO has increasingly attended to cultural heritage issues affecting indigenous peoples and has also begun providing opportunities for indigenous participation. For example, meetings were held in February 1995 and June 1996. While the themes of the meetings are still set by UNESCO, indigenous representatives are invited by UNESCO to participate in the plenary sessions as well as in the

²⁹⁴ *Review of UN existing mechanisms, supra* note 107.

²⁹⁵ Under the 1970 *Convention*, UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin. In 1993, Madame Daes reported that thus far, indigenous peoples have not been able to participate in the work of the Committee: *Cultural and intellectual property study, supra*, Chapter 2, note 20 at para. 126.

working groups in order to submit recommendations to the organizations.²⁹⁶ In 1993, UNESCO established a Focus Point Unit within its culture sector working on indigenous issues so that indigenous peoples are among those being considered as a priority for UNESCO's action during the International Decade of the World's Indigenous People. UNESCO's policy approach in the area of indigenous issues is that this is a long-term task that is based on regular consultation with indigenous partners.²⁹⁷ The primary focus of its activities has been on capacity-building and training initiatives within indigenous communities.

In 1996, Madame Daes reported that UNESCO had established an intersectoral task force to deal with matters specifically concerned with indigenous peoples. UNESCO also suggested that it would be the appropriate body to produce the "comprehensive annual report" described in paragraph 55 of the draft principles and guidelines contained in Madame Daes' *Final Report* by becoming a special chapter in the biennial reports on the state of culture, which UNESCO planned to prepare in the future.²⁹⁸

In 2002, UNESCO submitted a review of its activities relating to indigenous peoples to the first session of the Permanent Forum on Indigenous Issues. UNESCO reported that

²⁹⁶ *Review of UN existing mechanisms*, *supra* note 10 at para. 52.

²⁹⁷ *Ibid.* at para. 79.

²⁹⁸ *Supplementary Report*, *supra* note 229 at paras. 7 & 8.

Within the framework of the International Decade of the World's Indigenous People, the action of the Division of Cultural Policy draws its inspiration from the Declaration of Mexico on Cultural Policy of 1982, the report of the World Commission on Culture and Development *Our Common Diversity* (UNESCO, 1996) and the plan of action on cultural policy and development adopted by the Stockholm Conference in 1998. It may also be noted that the UNESCO Universal Declaration on Cultural Diversity and its plan of action, adopted by the thirty-first session of the General Conference, constitutes a major contribution by UNESCO to the Decade and a concrete framework for interdisciplinary action in line with the aspirations of indigenous communities in the world, in particular in the area of defence of cultural pluralism...²⁹⁹

The report highlighted the fact that protection of the cultural identity of indigenous people is a major theme in UNESCO's activities during the entire period of the Draft Medium-Term Strategy for 2002-2007.³⁰⁰ In its Draft Programme and Budget for 2002-2003, one of UNESCO's main objectives within its culture programme is the "construction of cultural pluralism and strengthening of action in favour of indigenous peoples" through an intersectoral effort. UNESCO states that in order to come closer to indigenous realities, it will promote:

²⁹⁹ Permanent Forum on Indigenous Issues, *Review of Activities of United Nations System Relating to Indigenous Peoples: An Interactive Discussion, Information received from the United Nations system, The United Nations Educational, Scientific and Cultural Organization and Indigenous Peoples*, UN Doc. E/CN.19/2002/2/Add.7 (11 April 2002) at para. 2.

³⁰⁰ *Ibid.*

- (a) The adoption of national cultural policies which highlight the cultural resources of indigenous people and acknowledge their cultural rights;
- (b) The protection of indigenous heritage, especially intangible heritage;
- (c) The active participation of the communities in the management of sites, specifically World Heritage sites and holy sites;
- (d) The provision of education incorporating indigenous languages in the curricula;
- (e) The participation of members of the communities in democratic bodies at the local and national levels;
- (f) The provision of media infrastructure and communication facilities tailored to their needs;
- (g) Recognition of the importance of the traditional knowledge at the heart of indigenous lifestyles and the establishment of links between indigenous and scientific knowledge aimed at sustainable development. For example, the implementation of the project "Local and indigenous knowledge systems (LINKS) in a global society (draft document 31 C/5, para. 02411), whose principal content and focus relate to the natural sciences, was devised through an intersectoral and interdisciplinary approach within the two cross-cutting themes. The aim of this project will be to promote recognition of local and indigenous knowledge, i.e. sophisticated sets of understandings, interpretations and meanings possessed by communities with long histories of interaction with the natural environment, as a powerful resource for combating marginalization and impoverishment.³⁰¹

UNESCO succeeded in having 2002 proclaimed as the United Nations Year for Cultural Heritage. As part of its activities, UNESCO was engaged in practical methods to preserve the rich cultural heritages of indigenous peoples, many of which were in danger of disappearing. UNESCO representatives

³⁰¹ *Ibid.*

reported to the Permanent Forum that UNESCO would be hosting a round table on intangible cultural heritage in September 2002 and a global education forum that would include indigenous issues and concerns³⁰².

Members of the Permanent Forum expressed their appreciation for UNESCO's initiatives in response to the International Decade of the World's Indigenous Peoples. They noted however that the UNESCO *Universal Declaration on Cultural Diversity*³⁰³ did not include a specific section on indigenous peoples.³⁰⁴ Members also stressed the need for measures such as participatory research and historical records and educational materials that incorporated indigenous perspectives.³⁰⁵ The Vice-Chairperson summarized the Permanent Forum discussions on UNESCO activities by supporting the need to respect and protect traditional knowledge through research, fostering dialogue and inclusion by international organizations of programmes of action developed by indigenous peoples.³⁰⁶

Indigenous peoples have had to rely on existing cultural property treaties and UN specialized agency (UNESCO) processes as potential sources

³⁰² Permanent Forum on Indigenous Issues, *Report of the First Session of the Permanent Forum on Indigenous Issues by Rapporteur Mr. Wilton Littlechild*, UN Doc. E/2002/42/Supplement 43 (1 June 2002) at para. 61.

³⁰³ Res. Adopted on the report of UNESCO Commission IV at the 20th plenary mtg. (2 November 2001).

³⁰⁴ Permanent Forum on Indigenous Issues, *Report of the First Session*, *supra* note 302 at para. 62.

³⁰⁵ *Ibid.* at para. 63.

³⁰⁶ *Ibid.* at para. 76.

of protection of their heritage and knowledge. International cultural property law as a potential source of protection of indigenous heritage and knowledge is useful as a short-term response to immediate and immense pressures on the integrity and viability of indigenous heritages. The international cultural property system can also be potentially useful in the long-term if *sui generis* systems of protection under the existing cultural property regime can be implemented. In the meantime, indigenous peoples rely on influencing the development of “soft law” within UNESCO processes to influence the eventual creation of hard law on protection of their heritage and knowledge. As with their concerns with the IP regime however, indigenous peoples are also reluctant to commit wholeheartedly to relying on a cultural property regime that approaches heritage and knowledge as concepts of property, when such concepts are fundamentally incompatible with indigenous worldviews and systems.³⁰⁷

³⁰⁷ See note 279 and accompanying text.

4. CONCLUSIONS

Indigenous peoples share commonalities in their origins as distinct nations, the nature of their heritage and knowledge¹, their experiences of the profound impacts of colonialism on their knowledge and heritage, and their visions of revitalizing their heritage and knowledge as sources of their distinct identities. This thesis has focused on reviewing external sources of protection for indigenous heritage and knowledge. The usefulness of external initiatives, such as international law, must constantly be assessed and re-assessed against indigenous decolonization goals and aspirations. Therefore, the following conclusions of the usefulness of international law are offered, as measured against principles of indigenous decolonization goals and aspirations for protecting their heritage and knowledge.

¹ Although the diversity of indigenous peoples is reflected in the wide spectrum of their knowledge and heritage, Cajete identifies strands of connectedness across indigenous diversity. Indigenous teachings such as with respect to the Trickster, the Sacred Twins, the Earth Mother, the Corn Mothers, the Thunderbirds, the Great Serpents, the Culture Hero, Grandmother Spider-Woman, and the Tree of Life all reflect similar ecological understandings, based on observation of processes inherent in nature: *A Global Challenge, supra*, Chapter 2, note 39 at 40.

4.1 Indigenous heritage and knowledge are the sources of distinct indigenous identity.

Indigenous peoples' "ways of knowing" (or knowledge) and all the elements of heritage² associated with their ways of knowing are the sources of their identity as distinct peoples. Systems of indigenous heritage and ways of knowing grew and evolved for centuries, predating colonial contact with European peoples. Despite the destructive effects of colonialism on indigenous culture and identity, many indigenous peoples maintained their internal systems of preserving, teaching, and transmitting heritage and knowledge within their families and communities.³ In contemporary times, indigenous peoples envision healing from the effects of colonialism through reconnecting

² 11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous peoples also includes objects, knowledge and literary or artistic works which may be created in the future based on their heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotapes, or audiotape. See Annex in *Final Report on protection of heritage, supra*, Chapter 2, note 78.

³ See collection of essays by indigenous scholars in Battiste, *supra*, Chapter 1, note 5.

with and revitalizing their heritage and knowledge as the continuing source of their identity as distinct peoples.⁴

4.2 Indigenous heritage and knowledge are a reflection of a particular approach to reality and are reflected in indigenous languages.

Henderson and Battiste write that most indigenous peoples view the world as independent of their beliefs about it. Further their worldview reflects their understanding of reality as a seamless dynamic force:

It is an external reality that is in a continuous state of transformation. The entire universe is seen as creative local space, as sacred realms of change. Together the realms create a flowing, transforming existence. Each realm is related to the movement and is described only in order to understand the process of change. The energy of the realms comes with transformations. These transformations do not always cause physical changes; they often cause changes in the manifestations or behaviors only of those who are aware of the subtle changes. If there is no change, the energies waste away. The realms are not outside each other, but are interactional. It is the interaction of all these parts that is important, rather than the different parts per se. Thus, the sacred space is considered as a transforming flux that constitutes an indivisible web of meanings. The web can be perceived, and occasionally reflections of the realms can be experienced. The total order, described as an indivisible world, can be best understood in English as the "implicate order."⁵

⁴ Battiste, "Introduction: Unfolding the Lessons of Colonization," *supra*, Chapter 1, note 5 at xvi-xxx; Laenui, *supra*, Chapter 1, note 5 at 152.

⁵ *A Global Challenge*, *supra*, Chapter 2, note 39 at 75-76.

Indigenous worldviews reflect their understandings of reality in these particular ways that are often in contradistinction to Eurocentric worldviews. Battiste and Henderson question whether indigenous worldviews can be translated into Eurocentric worldviews and languages: "The intercultural conflict between worldviews extends beyond questions of linguistic relativity and cultural pluralism, however, to the question of translatability. The traditional Eurocentric response is that worldviews can be translated. Yet, there are indications that this may not be true."⁶

Little Bear provides his perspective of why indigenous worldviews and languages are inherently different from European worldviews and languages; and hence, why they may not be completely translatable. He describes North American Indian philosophy as "cyclical and holistic. It is generalist and jack-of-all-trades-oriented as opposed to being oriented toward specialization, and is very process-oriented."⁷ Little Bear views indigenous languages as verb-centred in order to capture this dynamic approach to flux as a reality.⁸ Verbs best capture the features and processes of a worldview that sees everything as being in relationship and connected by a vibrating life force.

⁶ *Ibid.* at 81.

⁷ Little Bear, L., "What's Einstein Got to Do With It?" in Gosse, R., J. Youngblood Henderson and R. Carter, eds., *Continuing Poundmaker & Riel's Quest* (Saskatoon: Purich Publishing, 1994) at 73; Little Bear, L., "Jagged Worldviews Colliding" in Battiste, *supra*, Chapter 1, note 5 at 78 [hereinafter "Jagged Worldviews Colliding"].

⁸ "Jagged Worldviews Colliding," *supra*, Chapter 1, note 5 at 78.

Indigenous “ways of knowing” or knowledge are focused on the dynamic forces animating relationships between all aspects of life.⁹ Indigenous heritage can be seen as the manifestation of indigenous knowledge of reality. Indigenous heritage is comprised of those elements of human relationships that intersect with all aspects of life that are in a constant state of animate flux: e.g., lands and territories, medical knowledge, songs, dances, human remains, genetic resources, and plant knowledge. Indigenous languages therefore reflect and are repositories of this worldview and are difficult to translate into worldviews and languages that do not share their perspective and approach to reality.

4.3 The first and fundamental strategy of protecting indigenous heritage and knowledge is internal to indigenous peoples.

All indigenous peoples have always had their own customary systems of laws to regulate, transmit and protect their indigenous heritage and knowledge.¹⁰ These laws preserved and maintained indigenous heritage and knowledge in the face of colonialism for centuries. Contemporary indigenous strategies for reconnecting with and revitalizing their indigenous heritage and

⁹ W. Ermine, “Aboriginal Epistemology” in M. Battiste and J. Barman, *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995) at 104.

¹⁰ *Cultural and intellectual property study, supra*, Chapter 2, note 20 at paras. 27 to 30.

knowledge include reconnecting with and revitalizing these internal indigenous systems of protection.¹¹

Laenui writes that the first step in indigenous decolonization is for indigenous peoples to engage in a process of rediscovery and recovery.¹² As part of this initial stage, indigenous peoples have been immersed in assessing the current state of indigenous heritage, knowledge and languages. Indigenous peoples have always understood that as long as indigenous languages continued to be spoken and used as the language of instruction within families and communities, indigenous heritage and knowledge continued to live. Therefore, contemporary strategies for preserving and rejuvenating indigenous heritage and knowledge must necessarily focus on internal rediscovery and recovery processes of preserving and rejuvenating indigenous languages as well.¹³

4.4 External strategies of protecting indigenous heritage and knowledge must take a holistic approach.

Any subsequent strategy of external intervention as part of the action stage of decolonization must be based on and complement indigenous internal systems of regulating, transmitting and protecting knowledge and language.

¹¹ See Articles 4 and 5 of Annex in *Final Report on protection of heritage, supra*, Chapter 2, note 78.

¹² See *supra*, Chapter 2, note 95 and accompanying text.

¹³ *Ibid.*; see also *supra*, Chapter 3, note 302 at para. 63 and accompanying text.

Indigenous peoples have encountered serious obstacles in how their concerns are framed and approached in outside systems such as international law. Indigenous positions on protecting indigenous heritage and knowledge through such fora as international law have been based on the principle that systems of protection must be holistic in approach in order to reflect and respect the integrity of indigenous holistic approaches. Madame Daes accurately captured indigenous positions when she stated that “any protective regimes designed by the international community must take the approach of managing and protecting all elements of indigenous heritage as a single, interrelated and integrated whole.”¹⁴ In her studies, she concluded that “it is inappropriate to subdivide the heritage of indigenous peoples into separate legal categories such as cultural, artistic or intellectual; or to subdivide it into separate elements such as songs, stories, science or sacred sites.”¹⁵ Madame Daes stated that it is more appropriate to avoid making such distinctions for indigenous peoples and concluded “it is clear existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate but inherently unsuitable for the needs of indigenous peoples.”¹⁶

¹⁴ See *supra*, Chapter 3, note 117 and accompanying text.

¹⁵ See *supra*, Chapter 3, note 115 and accompanying text.

¹⁶ See *supra*, Chapter 3, note 116 and accompanying text.

4.5 Of the external strategies available under international law, human rights law offers the most potential for constructing a holistic approach to protecting indigenous heritage and knowledge.

For indigenous peoples, the most effective external strategy is seen as gaining international political and legal recognition of their human right to self-determination.¹⁷ Having their right to self-determination recognized under international law would create the legal status and scope of authority that indigenous peoples seek. While protections and processes under existing UN *Charter* and human rights treaty systems allow for a certain amount of indigenous consultation and redress, in the end they do not provide indigenous peoples with the same level of authority and participation in determining the actual sources of international law that would protect their indigenous knowledge and heritage in a manner that would reflect and respect their worldviews and standards.

For some indigenous peoples, gaining the right to self-determination means statehood.¹⁸ For the majority of indigenous peoples however, the internal form of the right to self-determination is seen as the most promising avenue for having their systems of heritage and knowledge recognized and

¹⁷ See *supra*, Chapter 3, note 30 and accompanying text.

¹⁸ See *supra*, Chapter 3.3.1. and *supra*, Chapter 3, note 56 and accompanying text.

protected.¹⁹ Trends in the international system of international relations and human rights law since the conclusion of the Second World War indicate that there is a movement away from a purely state-centered system of international relations to a more human-centered system of international relations and law.

McCorquodale writes:

Self-determination can be seen as part of a change in the international legal order away from a state-centered structure to one where other entities, groups and individuals are involved. By asserting that the consent – the “will”- of the people is a paramount factor in the exercise of self-determination, international law could be seen as putting people at the centre of the legal order.²⁰

These promising trends within international human rights laws and system are reflected in the growing receptivity to indigenous presence, interests and concerns within an international system that has traditionally excluded them.

Particularly since the early 1980's with the establishment of the Working Group on Indigenous Populations within the UN human rights system, indigenous peoples have increasingly made their presence and issues known within the international human rights system.²¹ The focus of the international UN human rights system on initiatives and activities designed to promote and protect their interests and concerns as a distinct group through

¹⁹ See *supra*, Chapter 3, notes 93 & 94 and accompanying text.

²⁰ McCorquodale, in *Self-Determination in International Law*, *supra*, Chapter 2, note 84 at xviii.

²¹ See *supra*, Chapter 3, notes 16 to 22 and accompanying text.

the International Decade has done much to establish their political and legal presence within the international forum.²²

The climate of the changing international order made the Draft Declaration on Indigenous Rights²³ and the Principles and Guidelines on the Heritage of Indigenous Peoples²⁴ possible as human rights legal initiatives for protecting indigenous heritage and knowledge. The Declaration and Guidelines were envisioned by indigenous peoples as implementing their human right to self-determination through internal forms. Many indigenous peoples see internal forms of self-determination as being capable of providing a seamless integrated approach to promoting and protecting their heritage and knowledge by respecting the integrity of their worldviews and systems.²⁵

Through their work within the UN human rights system, indigenous peoples have succeeded in contributing to the current international trend of increasing international recognition of “soft law” such as UN General Assembly resolutions, policies and practices as additional sources of international law.²⁶ Indigenous peoples have succeeded in increasing the international community’s awareness and understanding of pressing issues

²² See *supra*, Chapter 3, notes 23 to 26 and accompanying text.

²³ See *supra*, Chapter 3, note 80 & 82.

²⁴ See *supra*, Chapter 3, note 78.

²⁵ See *supra*, Chapter 3, notes 115 to 118 and accompanying text.

²⁶ See *supra*, Chapter 3.1.

and concerns affecting their heritage and knowledge by shepherding the Draft Declaration and the Guidelines through the UN human rights system.

It is through international human rights law that indigenous peoples have the best recourse to preserving the integrity of the holistic nature of their worldview and approach to their heritage and knowledge. The right to self-determination provides enough conceptual space for indigenous peoples to carry out their internal processes of customary transmission, preservation and revitalization of their heritage and knowledge as well as to create an integrated external approach that will protect and filter the sharing of their heritage with other peoples in respectful ways. If the Draft Declaration and Guidelines do become General Assembly resolutions, indigenous peoples' initiatives through international human rights law will result in a critically needed layer of external protection of their heritage and knowledge.

4.6 The remaining external options available under international law offer, at best, fragmented approaches for protecting indigenous heritage and knowledge.

Although international human rights law offers the most ideal avenue for providing a holistic approach to protecting indigenous knowledge and heritage, indigenous peoples realize that legal protection under human rights law²⁷ may not occur quickly or come to fruition at all. Therefore, other fields of

²⁷ Draft Declaration on Rights of Indigenous Peoples and Principles and Guidelines for the Protection of the Heritage of Indigenous People.

international law need to be examined as additional or alternative outside sources to protect indigenous heritage and knowledge. There have been promising initiatives within the fields of international environmental, trade, intellectual property and cultural property law within the last decade.

The most fundamental problem with seeking protection from these various areas of international law is conceptual. Henderson observes that Eurocentric worldviews are characterized by their own assumptions, approaches, structures and processes.²⁸ As international law has its roots in European traditions, it is no small wonder that it reflects Eurocentric worldviews. The mere fact of the existence of the particular fields of international law reflects Eurocentric worldviews, and the nature and assumptions underlying the various fields also reflect Eurocentric worldviews, beliefs and values. From the indigenous perspective, Eurocentric worldviews are characterized by a fragmentary, compartmentalized approach to understanding and interacting with reality, while indigenous worldviews are characterized by a holistic seamless approach.²⁹ Indigenous heritage and knowledge therefore loses its integrity when seen through a fragmentary perspective.

²⁸ See *supra*, Chapter 3, notes 109 to 111 and accompanying text.

²⁹ See *supra*, Chapter 3, notes 116 & 117 and accompanying text.

Categorizing and compartmentalizing aspects of indigenous heritage and knowledge through Eurocentric categories such as environmental, trade, intellectual property and cultural property law does not capture the seamless nature of the interrelationships between the various aspects of indigenous heritage and knowledge. Indigenous peoples therefore are understandably uncomfortable seeking protection under areas of international law that fragments the various aspects of their heritage and knowledge by potentially miscategorizing or omitting important aspects of indigenous heritage and knowledge that belong together.³⁰

Another aspect of the conceptual problem is that the assumptions underlying a particular field of international law may be incompatible. For instance, treating sacred aspects of indigenous heritage and knowledge as commodities under the property-based systems of international trade, intellectual and cultural property law is contradictory for indigenous peoples. Eurocentric concepts of individual and collective ownership and alienability are also often incompatible with indigenous conceptions.

The second major problem with seeking protection under the various areas of international law is that indigenous peoples enjoy far less political and legal status than within the international human rights system. Law and

³⁰ See Madame Daes' understanding of this problem in seeing the relationships between songs and land, *supra*, Chapter 3, note 118 and accompanying text.

policy within environmental, trade, intellectual and cultural property law are very much driven by the interests and concerns of states within what is still a colonial-based “balance of power” system. As indigenous peoples do not enjoy the legal status of statehood, they are excluded as Members of the various treaties and their systems. In all the various fields and their fora, indigenous peoples still lobby primarily through observer status or through third party states and NGO’s.

Of all the areas of international law, trade law has been the least affected by the trend toward a more human-centered system of international relations. Therefore, although indigenous knowledge and heritage have come under increasing attention within trade discussions, they have taken place within the context of protecting and promoting state trade interests in indigenous knowledge and heritage. State interests in indigenous heritage and knowledge has been generated through trends such as globalization, interdependence, rapid growth of human innovation (telecommunications and biotechnology), and a shifting world economic base.³¹ Further, with the advent of *GATT*, the international intellectual property system has been co-opted by the international trade regime to more effectively regulate states’ trading

³¹ See *supra*, Chapter 3, note 196 and accompanying text.

interests relating to all intellectual property, including indigenous knowledge and heritage.³²

The international trade field has also spawned one of the biggest threats that continue to confront indigenous peoples. More and more, TNC's are controlling trade and intellectual property interests within the international economic order.³³ As international trade law has not effectively established methods to control and regulate TNC's activities, TNC's represent a continuing threat for indigenous peoples because of their uncontrolled extractive activities within indigenous lands, territories and personhood.³⁴ Indigenous peoples have had to turn to existing human rights processes to protect their knowledge and heritage from the uncontrolled extractive and commercial activities of TNC's, as opposed to being able to rely on regulatory mechanisms within international trade law.³⁵

With respect to environmental law initiatives, indigenous peoples have been communicating their interests and concerns about environmental degradation stemming from colonial extractive activities for years within international fora. Yet, it has only been recently that international environmental law has responded to environmental degradation issues, and

³² See *supra*, Chapter 3, note 209 & 210 and accompanying text.

³³ See *supra*, Chapter 3, note 199 & 205 and accompanying text.

³⁴ See *supra*, Chapter 3, note 206 and accompanying text.

³⁵ See *supra*, Chapter 3, note 148 & 151 and accompanying text.

only then in response to interests and concerns being expressed by states or by groups such as environmentalists and scientists rather than indigenous groups.³⁶ Of the various fields of international law other than human rights, international environmental law has explicitly included provisions related to issues and concerns of indigenous peoples within an environmental treaty (CBD).³⁷ In addition to the first contemporary example of hard law relating to protection of indigenous knowledge, there have been other promising initiatives that are generating “soft law” in environmental law, stemming from the inclusive approach of the CBD of indigenous peoples and their issues within the CBD treaty and UNEP policies and processes.³⁸ Although indigenous peoples are taking full advantage of the opportunity to participate within CBD and UNEP processes, they are still limited in participation status. They are also cautious of an environmental protective regime (CBD) that is explicitly based on an anthropocentric model as compared to their approach that is more ecocentric in nature.³⁹

Within the fields of international intellectual and cultural property law, the single biggest difficulty for indigenous peoples has already been

³⁶ See World Commission on Environment and Development report *Our Common Future* in *supra*, Chapter 1, note 3, and *supra*, Chapter 3, notes 158 & 159 and accompanying text.

³⁷ See Rio Declaration, Agenda 21, and Article 8 (j) of the CBD in *supra*, Chapter 3, notes 163 to 169.

³⁸ See *supra*, Chapter 3.4.1.

³⁹ See *supra*, Chapter 3, note 184 & 188 and accompanying text.

identified as conceptual incompatibility.⁴⁰ It is ironic that the two fields outside of human rights law that were created to protect cultural heritage are the most incompatible with indigenous assumptions, approaches, structures and processes. Although there have been positive developments of more systematic inclusion of indigenous perspectives and peoples within WIPO and UNESCO within the last few years⁴¹, indigenous peoples are aware that it is still Member States that determine the agenda of intellectual and cultural property policy issues and initiatives. The central focus in intellectual property has been traditional knowledge which is clearly the international community's response to global issues of globalization, increased human innovation and increased intellectual property value in human innovations such as biotechnology. The question for indigenous peoples is whether the international community's intense interest in and protective initiatives toward their genetic heritage and traditional knowledge is based on a genuine response to indigenous interests and concerns or whether it is an economic-driven response.

At the end of the day, it is still state representatives that retain the power to make international law within the various fields of international law. As long as they exclusively retain that power, regimes of protection under

⁴⁰ See text at beginning of this section (Chapter 4.6).

⁴¹ See *supra*, Chapter 3.4.3.

international law will continue to reflect the worldview, language approaches, and preferred processes of UN state representatives for protecting indigenous peoples' heritage and knowledge.

There is no magic solution contained within any of the additional areas of international law that finally and fully cloaks indigenous heritage and knowledge from destructive colonial activities. Indigenous strategies still see the value in seeking protection from external systems as the most immediate pressures and challenges are being felt from outside sources. Although protection from outside systems such as international law does not necessarily meet indigenous peoples' needs in the way they need to be met, current protections available under existing areas of international law are still necessary as interim protection despite their shortcomings and drawbacks. Many indigenous peoples have chosen to utilize currently available protections under the various areas of international law until such time as more transformative regimes can be put in place that are respectful and inclusive of their worldviews, languages and preferred processes of protection.

In the meantime, indigenous peoples also continue to rely on their internal systems of protection to preserve, protect and maintain their identities as distinct peoples as they have successfully done for centuries. The fact that indigenous peoples, heritage and knowledge exists today after centuries of colonialism attests to the continuing power of internal systems of protection.

4.7 Indigenous heritage and knowledge must be respected and protected under a post-colonial framework of international law if they are to be shared on an equitable basis with all the peoples of the world.

The awesome diversity of indigenous peoples is reflected in their relationship with some of the most biologically diverse ecosystems on Mother Earth.⁴² Most indigenous peoples carry knowledge and an awareness of the sacred gifts they were entrusted with to nurture and maintain creation in all its complex interrelationships.⁴³ Most indigenous knowledge systems are also characterized by the value of sharing knowledge on an equitable basis for the good of all life forms and forces on Mother Earth.

The experience of withstanding centuries of the cycle of colonialism has severely damaged many indigenous systems of protecting, preserving and transmitting their knowledge and heritage. Many indigenous peoples are in the first decolonization stage of rediscovery and recovery of their indigenous knowledge and heritage.⁴⁴ One Aboriginal educator's story, shared within another context, has some teachings on this point:

I had a dream that all people of the world were together in one place. The place was cold. Everyone was shivering. I looked for a fire to warm myself. None was to be found.

⁴² See *supra*, Chapter 2, notes 9 to 12 and accompanying text.

⁴³ H. Cardinal, and W. Hildebrandt, *Treaty Elders of Saskatchewan – Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*. (Calgary: University of Calgary Press, 2000) at 10-12.

⁴⁴ See process of decolonization as described by Laenui in *supra*, Chapter 2, note 95 and accompanying text.

Then someone said that in the middle of the gathering of Indians, what was left of the fire has been found. It was a very, very small flame. All the Indians were alerted that the slightest rush of air or the smallest movement could put the fire out and the fire would be lost to humankind. All the Indians banded together to protect the flame. They were working to build the fragile feeble flame. They added miniscule shavings from toothpicks to feed it. Suddenly, throughout the other peoples, the whisper was heard. 'The Indians have a fire.' There was a crush of bodies stampeding to the place where the flame was held. I pushed to the edge of the Indian circle to stop those coming to the flame so that it would not be smothered. The other people became hostile saying that they were cold too and it was our responsibility to share the flame with them. I replied, "It is our responsibility to preserve the flame for humanity and at the moment it is too weak to be shared but if we all are still and respect the flame it will grow and thrive in the caring hands of those who hold it. In time we can all warm at the fire. But now we have to nurture the flame or we will all lose the gift.'⁴⁵

As part of their decolonization process, indigenous peoples have embraced external strategies such as seeking protection under a colonial framework of international law, while simultaneously trying to move toward a post-colonial framework of international relations and law. Indigenous peoples believe that once international society moves away from valuing singularity to valuing diversity, then international society and its laws can be characterized as having moved beyond colonialism as an organizing framework. International law is in a position to support the internal

⁴⁵ C. King, Here come the Anthros - Paper presented at the 88th Annual Meeting of the American Anthropological Association (Washington, D.C.) as referenced in Ermine, *supra* note 9 at 111.

decolonization processes underway in many indigenous nations and communities. Once indigenous peoples are in the position to freely choose to share their indigenous knowledge and heritage with all other peoples on an equitable basis, in a good way, then the internal and external processes of decolonization can be said to have converged to create a post-colonial framework of international relations.

REFERENCES

INTERNATIONAL TREATIES

Annex 1C Agreement on trade-related aspects of intellectual property rights of Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, Legal instruments embodying the results of the Uruguay Round, 14 April 1994, Vol. 31 (1994) 33 I.L.M. 81, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 31 May 2002).

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, online, UNEP <<http://www.biodiv.org/biosafety/protocol.asp>> (last modified: 29 October 2001).

Convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (Convention No. 107) which entered into force on 2 June 1959.

Convention on Biological Diversity: final text (Paris: Dept. of Public Information, 1992), opened for signature at United Nations Conference on Environment and Development, 5 June, 1992, 31 I.L.M. 818.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (1971) 10 I.L.M., reprinted in Williams, S., *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, NY: Oceana Publications, 1978).

Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 and 18 October 1917.

Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, Legal instruments embodying the results of the Uruguay Round, 14 April 1994, Marrakesh, Vol. 1, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 31 May 2002).

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, (1956) 249 U.N.T.S. 240, reprinted in Williams, S., *The*

International and National Protection of Movable Cultural Property: A Comparative Study (Dobbs Ferry, NY: Oceana Publications, 1978).

ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, concluded 27 June 1989, entered into force 5 September 1991, 72 *ILO Official Bulletin* 59; reprinted in 28 *I.L.M.* 1382 (1989).

International Covenant on Civil and Political Rights (ICCPR), concluded 16 December 1966, entered into force 23 March 1976, 999 *U.N.T.S.* 171.

International Covenant on Economic, Social and Cultural Rights (ICESCR), concluded 16 December 1966, entered into force 3 January 1976, 993 *U.N.T.S.* 3.

INTERNATIONAL AND REGIONAL DOCUMENTS

African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev.5; reprinted in 21 *I.L.M.* 59 (1982).

Commission on Human Rights, *Cultural and intellectual property of indigenous people*, Commission on Human Rights Dec. 1994/105, 50th Sess., UN Doc. E/CN.4/DEC/1994/105 (4 March 1994).

Commission on Human Rights, *Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, Commission on Human Rights Res. 1995/32, UN ESCOR, 51st Sess., UN Doc. E/CN.4/RES/1995/32 (3 March 1995).

Commission on Human Rights, *Protection of the heritage of indigenous people*, Commission on Human Rights Res. 1996/63, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/RES/1996/63 (23 Apr 1996).

Commission on Human Rights, *Report of the Working Group established in accordance with Commission on Human Rights Res. 1995/32 of 3 March 1995 - Chairperson-Rapporteur: Mr. José Urrutia (Peru)*, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/1996/84 at 9 (4 January 1996).

Commission on Human Rights, *The Right of Everyone to Own Property Alone As Well as in Association with Others*, Study by L. Rodriquez, UN ESCOR, 1992, UN Doc. E/CN.4/1993/15 (18 December 1992).

Economic and Social Council, *Cultural and intellectual property of indigenous people*, ESC Dec.1994/274, 43rd plenary mtg., UN Doc. E/DEC/1994/274 (25 July 1994).

Economic and Social Council, *Establishment of a Permanent Forum on Indigenous Issues*, ESOCOR Res. 2000/22, 45th plenary mtg., UN Doc. E/RES/2000/22 (28 July 2000).

Economic and Social Council, *Protection of the heritage of indigenous people*, ESC Res. 1996/24, UN ESCOR, 1996, UN Doc. E/RES/1996/24.

General Assembly, *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the UN Charter*, G.A. Res. 2625 (XXV), 24 October 1970.

General Assembly, *Declaration on the Granting of Independence to Colonial Countries*, A/RES/1514 (XV), 14 December 1960.

General Assembly, *The human genome and human rights*, GA Res. 53/152, UN GAOR, 85th plenary mtg., UN Doc. A/RES/53/152 (9 December 1998) UN General Assembly. UN GA Res. A/RES/53/152 (9 Dec. 1998).

General Assembly, *International Decade of the World's Indigenous People*, GA Res. 48/163, UN GAOR, 48th Sess., UN Doc. A/RES/48/163 (18 February 1994).

General Assembly, *International Year of the World's Indigenous Peoples*, GA Res. 45/164, UN GAOR, 1990, UN Doc. A/RES/45/164 (18 December 1990).

General Assembly, *Programme of activities for the International Decade of the World's Indigenous People*, GA Res. 50/157, UN GAOR, 97th plenary mtg. of 21 Dec. 1995, UN Doc. A/RES/50/157 (21 December 1995).

General Assembly, *Report of the United Nations Conference on Environment and Development*, (Rio de Janeiro, 3-14 June 1992), Annex I (Rio Declaration on Environment and Development), UN GAOR, 1992, UN Doc. A/CONF.151/26 (Vol. I).

General Assembly, *Report of the World Conference on Human Rights – Report of the Secretary-General*, UN GAOR, UN Doc. C/CONF.157/24 (Part I) (13 October 1993).

General Assembly, *Review of the existing mechanisms, procedures and programmes within the UN concerning indigenous peoples* – Report of the Secretary-General, GA Res. A/51/493, GA OR, 51st Sess., UN Doc. A/51/493 (14 November 1996).

Permanent Forum on Indigenous Issues, *Report of the First Session of the Permanent Forum on Indigenous Issues by Rapporteur Mr. Wilton Littlechild*, UN Doc. E/2002/42/Supplement 43 (1 June 2002).

Permanent Forum on Indigenous Issues, *Review of Activities of United Nations System Relating to Indigenous Peoples: An Interactive Discussion, Information received from the United Nations system, The United Nations Educational, Scientific and Cultural Organization and Indigenous Peoples*, UN Doc. E/CN.19/2002/2/Add.7 (11 April 2002).

Permanent Forum on Indigenous Issues, *Review of Activities of the United Nations System Relating to Indigenous Peoples: An Interactive Discussion – Information received from the United Nations system, World Intellectual Property Organization*, UN Doc. E/CN.19/2002/2/Add.1 (8 April 2002).

Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

Rio Declaration on Environment and Development, Report on UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, vol. I.

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Cultural and intellectual property of indigenous people*, Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1993/44, 35th mtg., UN Doc. E/CN.4/Sub.2/RES/1993/28 (26 August 1993).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human genome diversity research and indigenous peoples – Note by the Secretariat*, UN Doc. E/CN.4/Sub.2/AC.4/1998/4 (04 June 1998), online: UN <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/aa73d1a2696c63d5802566440048ae16?Opendocument>> (date accessed: 16 February 2002).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Decade of the World's Indigenous People*, UN ESCOR, 27th mtg., UN Doc. E/CN.4/Sub.2/RES/1997/15 (22 August 1997).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people*, Sub-Commission Res. 1996/37, UN ESCOR, 35th mtg., UN Doc. E/CN.4/Sub.2/RES/1996/37 (29 August 1996).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people*, Sub-Commission Res. 1997/13, UN ESCOR, 27th mtg., UN Doc. E/CN.4/Sub.2/1997/13 (22 August 1997).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people, Final Report of the Special Rapporteur, Mrs. Erica Irene-Daes*, UN Doc. E/CN.4/Sub.2/1995/26 (21 June 1995).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Protection of the heritage of indigenous people, Supplementary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted pursuant to Sub-/Commission res. 1995/40 and Commission on Human Rights Res. 1996/63*, UN Doc. E/CN.4/Sub.2/1996/22 (24 June 1996).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Technical Meeting on the Protection of the Heritage of Indigenous People* (Geneva, 6-7 March 1997), UN ESCOR, 49th Sess., UN Doc. E/CN.4/Sub.2/1997/15 (24 June 1997).

Sub Commission on Prevention of Discrimination and Protection of Minorities, *The right to self-determination: historical and current developments on the basis of UN instruments* - Study/prepared by Aureliu Cristescu, Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, 1981/E/CN.4/Sub.2/404/Rev.1.

Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study on the protection of the cultural and intellectual property rights of indigenous peoples*, prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1993/28 (28 July 1993), online: UN <<http://www.unhchr.ch/huridocda/huridoca.nsf/Documents?OpenFrameset>> (date accessed: 15 February 2002).

Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Transnational investments and operations on the lands of indigenous peoples, Report of the Centre on Transnational Corporations submitted pursuant to Sub-Commission resolution 1990/26*, UN Doc. E/CN.4/Sub.2/1994/40 (15 June 1994).

Sub-Commission on the Promotion and Protection of Human Rights, *Draft principles and guidelines for the protection of the heritage of indigenous peoples*, Sub-Commission Dec. 2000/107, UN Doc. E/CN.4/Sub.2/DEC/2000/107 (17 August 2000).

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001).

Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property and human rights*, Sub-Commission Res. 2001/21, UN ESCOR, 26th mtg., UN Doc. E/CN.4/Sub.2/RES/2001/21 (16 August 2001).

Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property and human rights – Report of the Secretary-General*, UN ESCOR, 52nd Sess., UN Doc. E/CN.4/Sub.2/2001/12/Add.1 (3 July 2001).

Sub-Commission on the Promotion and Protection of Human Rights, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples* (Geneva, 28 Feb. – 1 March 2000), UN ESCOR, 52nd Sess., UN Doc. E/CN.4/Sub.2/2000/26 (19 June 2000).

Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Indigenous Populations*, UN ESCOR, 35th mtg., UN Doc. E/CN.4/Sub.2/1993/29, Add. 1-2 (26 August 1993).

Sub-Commission on the Promotion and Protection of Human Rights, *Working paper on indigenous people and their relationship to land*, UN ESCOR, 33rd mtg., UN Doc. E/CN.4/Sub.2/RES/1999/21 (26 August 1999).

United Nations, *Study of the problem of discrimination against indigenous populations, Volume V Conclusions, Proposals and Recommendations* – Final report submitted by the Special Rapporteur, Mr. Jose R. Martinez Cobo (New York: United Nations, 1987).

United Nations Conference on Environment and Development, *Report of the UN Conference on Environment and Development*, Doc. A/CONF.151/26/Rev.1, vol. I, at para 26.4 (b).

United Nations Environment Programme, CBD/COP, *Dec. EM-I/3, Adoption of the Cartagena Protocol and interim arrangements and annex*, UNEP/CBD/COP/EM-I/3, 1st extra-ord. mtg., Cartagena, Colombia & Montreal, Canada, 22 - 23 February 1999 & 24 - 28 January 2000.

United Nations Environment Programme, CBD/COP, *Dec. on implementation of Art. 8(j) and related provisions*, UNEP/CBD/COP/4/9, 4th ord. mtg., Bratislava, Slovak Republic, 4-15 May 1998.

United Nations Environment Programme, CBD/COP, *Dec. on Work plan of the Intergovernmental Committee for the Cartagena Protocol on Biosafety*, UNEP/CBD/COP/5/1, 5th ord. mtg., Nairobi, Kenya, 15-26 May 2000.

United Nations Environment Programme, *Report of the first mtg. of the Ad Hoc Open-ended Inter-Sessional Working Group on Art. 8(j) and Related Provisions of the Convention on Biological Diversity*, CBD COP, Nairobi, 15-26 May 2000, UNEP/CBD/COP/5/5.

WIPO, *Roundtable on Intellectual Property and Indigenous Peoples - Initiatives for Protection of Rights of Holders of Traditional Knowledge, Indigenous Peoples and Local Communities*, Doc. Prepared by Mr. Lars Anders Baer, Vice President, SAAMI Council, Jokkmokk, Sweden, WIPO/INDIP/RT/98/4A, 13 July 1998.

WIPO, General Assembly, *Report Adopted by the Assembly*, WIPO Doc. WO/GA/26/10 (3 October, 2000), online: WIPO <<http://www.wipo.int/globalissues/igc/documents/index.html>> (date accessed: 26 July 2002).

Working Group on Indigenous Populations, *Compilation of general recommendations from human rights treaty bodies referring to indigenous peoples - Note by the Secretariat*, UN ESCOR, 16th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1998/5 (10 June 1988).

Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its first session*, UN ESCOR, 1982, UN Doc. E/CN.4/Sub.2/1982/33.

Working Group on Indigenous Populations, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"* UN ESCOR, 14th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996).

World Conference on Human Rights, Vienna, 14-25 June 1993, *Report of the World Conference on Human Rights – Report of the Secretary General*, UN Doc. A/CONF.157/24, (Part I), chap. III, sect. II.B.

World Trade Organization, *Committee on Trade and Environment – Report of the Meeting Held on 21-22 June 1995 – Note by the Secretariat*, WTO Doc. WT/CTE/M/3 (18 July 1995), online, WTO <http://docsonline.wto.org/GEN_searchResult.asp> (date accessed: 31 May 2002).

World Trade Organization, Committee on Trade and Environment, *Report of the Meeting held on 16 February 1995 – Note by the Secretariat*, WTO Doc. WT/CTE/M/1 (6 March 1995), online: WTO <http://docsonline.wto.org/GEN_searchResult.asp> (date accessed: 1 June 2002).

World Trade Organization, General Council, *Minutes of Meeting* (held on 31 January 1995), WTO Doc. GC/M/1, online: WTO <http://docsonline.wto.org/GEN_searchResult.asp> (date accessed: 1 June 2002).

INTERNATIONAL JURISPRUDENCE

Advisory Opinion of the International Court of Justice, [1971] ICJ Reports 16.

Western Sahara, Advisory Opinion, [1975] I.C.J. Rept. 12.

SECONDARY MATERIAL: MONOGRAPHS

Anaya, S. J., *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996).

Anaya, S. J., "Self-Determination as a Collective Human Right Under Contemporary International Law," in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

"Appendix 3 – Declaration of Principles of the World Council of Indigenous Peoples" in D. A. Posey & G. Dutfield, *Beyond Intellectual Property – Toward*

Traditional Resource Rights for Indigenous Peoples and Local Communities (Ottawa, ON: International Development Research Centre, 1996).

Battiste, M., "Introduction: Unfolding the Lessons of Colonization" in M. Battiste, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

Battiste, M. & S. Henderson, *Protecting indigenous knowledge and heritage: a global challenge* (Saskatoon: Purich Publishing, 2000).

Battiste, M., ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

Bently, L., & B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2001).

Blakeney, M., "The International Framework of Access to Plant Genetic Resources" in M. Blakeney, ed., *Intellectual Property Aspects of Ethnobiology* (London: Sweet & Maxwell, 1999).

Blaut, J. M., *The Colonizer's Model of the World* (New York: The Guilford Press, 1993).

Burger, J., *The Gaia Atlas of First Peoples* (Toronto, ON: Anchor Books, 1990).

Canada, *Report of the Royal Commission on Aboriginal Peoples, Volume 3* (Ottawa: Communication Group, 1996).

Cardinal, H. & W. Hildebrandt, *Treaty Elders of Saskatchewan – Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations*. (Calgary: University of Calgary Press, 2000).

"Charter of the Indigenous Tribal Peoples of the Tropical Forests" in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

"COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity" in D. A. Posey & G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, ON: International Development Research Centre, 1996).

Colchester, M., "Indigenous Peoples and the Political Economy of Logging: The Case of Guyana and Suriname" in S. Buchi, *et al.*, eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 – 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Conserving Indigenous Knowledge – Integrating Two Systems of Innovation -An Independent Study by the Rural Advancement Foundation International Commissioned by the United States Development Programme (New York: RAFI, 1994).

CRS Report for Congress, *Biotechnology, Indigenous Peoples, and Intellectual Property Rights* (Washington: The Library of Congress, Congressional Research Service, 16 April 1993).

Daes, E.A., "The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration" in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

"Declaratory Law and Programmatic Law From Revolutionary Custom to 'Soft Law'" in R. Akkerman, *et al.*, eds., *Liber Roling, Declarations on Principles: A Question for Universal Peace* (Leyden: 1977).

Dhokalia, R.P., "Reflections on International Law-Making and Its Progressive Development in the Contemporary Era of Transition" in R. P. Dhokalia & R. S. Pathak, eds., *International Law in Transition – Essays in Memory of Judge Nagendra Singh* (Dordrecht: Martinus Nijhoff Publishers, 1992).

Dhokalia, R. P. & R. S. Pathak, *International Law in Transition – Essays in Memory of Judge Nagendra Singh* (Dordrecht:: Martinus Nijhoff Publishers, 1992).

Ermine, W., "Aboriginal Epistemology" in M. Battiste & J. Barman, *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995).

Flinterman, C. & E. Ankumah, "The African Charter on Human and Peoples' Rights" in H. Hannum, ed., *Guide to International Human Rights Practice*, 3 ed. (Ardsley, NY: Transnational Publishers, 1999).

Fourmile, H., "Indigenous Peoples, the Conservation of Traditional Ecological Knowledge, and Global Governance" in N. Low, ed., *Global ethics and environment* (New York: Routledge, 1999).

Gray, A., "Development Practice and Indigenous Peoples" in S. Buchi, et al., eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Hannum, H., "Rethinking Self-Determination" in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

Harry, D., S. Howard, & B. L. Shelton, *Indigenous People, Genes and Genetics - What Indigenous People Should Know About Biocolonialism* (Wadsworth: Indigenous Peoples Council on Biocolonialism, 2000).

Havini, R., "From Victims to Victors: Development Aggression and Indigenous Mobilisation" in S. Buchi, et al., eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Henkin, L., *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995).

Henriksen, J. B., "The Right of Self-Determination: Indigenous Peoples v. States" in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

Hitchcock, R. K., "International Human Rights, the Environment, and Indigenous Peoples" in *Endangered Peoples - Indigenous Rights and the Environment* (Niwot, CO: University Press of Colorado, Colorado Journal of International Environmental Law and Politics, 1994).

Jackson, M., "The Nature of Knowing: Self-Determination, Land and the Double Helix" in S. Buchi, et al., eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Kagan, D., S. Ozment, S. & F. M. Turner, *The Western Heritage* (Upper Saddle River, NJ: Prentice Hall, 1998).

"Kari-Oca Declaration and Indigenous Peoples Earth Charter" in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

Kingsbury, B., "Reconstructing Self-Determination: A Relational Approach" in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

Kiwanuka, B., "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

de Koning, M., "Biodiversity Prospecting and the Equitable Renumeration of Ethnobiological Knowledge; Reconciling Industry and Indigenous Interests" in M. Blakeney, ed., *Intellectual Property Aspects of Ethnobiology* (London: Sweet & Maxwell, 1999).

Kouevi, G., "The Right to Self-Determination of Indigenous Peoples: Natural or Granted? An African Perspective" in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

Laenui, P., "Processes of Decolonization" in M. Battiste, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

Levi, W., *Contemporary International Law*, 2nd ed. (San Francisco: Westview Press, 1991) at 50.

Little Bear, L., "Jagged Worldviews Colliding" in M. Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

Little Bear, L., "Relationship of Aboriginal People to the Land the Aboriginal perspective on Aboriginal Title," in CD-ROM, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal peoples* (Ottawa: Canada Communications Group, 1996), cited in Royal Commission on

Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinction* (Ottawa: Canada Communications Group, 1994).

Little Bear, L., "What's Einstein Got to Do With It?" in R. Gosse, J. Youngblood Henderson & R. Carter, eds., *Continuing Poundmaker & Riel's Quest* (Saskatoon: Purich Publishing, 1994).

Löffler, L.G., "Land Rights as Instruments of Social Transformation: The Case of the Chittagong Hill Tracts (Bangladesh) in S. Buchi, *et al.*, eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

"The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, in D. A. Posey & G. Dutfield, *Beyond Intellectual Property - Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, ON: International Development Research Centre, 1996).

McCorquodale, R., "Introduction" in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

McCorquodale, R., "Self-Determination: A Human Rights Approach" in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

McNeil, K., *Common Law Aboriginal Title* (New York: Oxford University Press, 1989).

Mead, Aroha Te Pareake, "Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific" in L. Pihama (Te Atiawa, Ngati Mahanga) & C. Waerea-i-te-rangi Smith (Ngati Porou, Ngati Apa), eds., *Cultural and Intellectual Property Rights - Economics, Politics and Colonisation, Volume II* (Auckland, NZ: International Research Institute for Maori and Indigenous Education and Moko Productions, 1997).

Messenger, P. M., *Whose Property? Whose Culture? The Ethics of Collecting Cultural Property*, 2nd ed. (Albuquerque: University of New Mexico Press, 1999).

Michelson, K., & W. Rees, "The Environment: Ecological and Ethical Dimensions" in E. Hughes, A. Hughes, & W. Tilleman II, eds., *Environmental Law and Policy* (Toronto: Emond Montgomery, 1998).

Morris, G. T., "The Right of Self-Determination for Indigenous Peoples" in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

Mynntti, K., "The Right of Indigenous Peoples to Self-Determination and Effective Participation," in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

Naanen, B., "Oil-Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni People" in S. Buchi, et al., eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 - 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Opekokew, D., "International Law, International Institutions and Indigenous Issues" in R. Thompson, ed., *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon, SK: University of Saskatchewan, Native Law Centre, 1987).

Pinel, S. & M. Evans, "Tribal Sovereignty and the Control of Knowledge" in Greaves, T., ed., *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma City: Society for Applied Anthropology, 1994) at 45.

Posey, D. A. & G. Dutfield, *Beyond Intellectual Property - Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, ON: International Development Research Centre, 1996).

"Resolution on the Ogoni People of Nigeria" in *Indigenous Peoples, Forests, and Biodiversity - Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

Schachter, O., *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991).

Simpson, T., *Indigenous Heritage and Self-Determination - The Cultural and Intellectual Property Rights of Indigenous Peoples* (Copenhagen: The International Work Group for Indigenous Affairs, IWGIA Document No. 86, 1997).

Smith, M. G., ed., *Global Rivalry & Intellectual Property – Developing Canadian Strategies* (Halifax, NS: The Institute for Research on Public Policy, 1991).

“Statement to the International Alliance’s Asia Regional Meeting, 31 January 1995, Baguio City, Philippines” in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

Suagee, D. & C.T. Stearns, “Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process” in *Endangered Peoples – Indigenous Rights and the Environment* (Niwot, CO: University Press of Colorado, Colorado Journal of International Environmental Law and Politics, 1994).

Tauli-Corpuz, V., “Three Years After Rio: An Indigenous Assessment” in S. Buchi, et al., eds., *Indigenous Peoples, Environment and Development, Proceedings of the conference Zurich, May 15 – 18, 1995* (Copenhagen: International Work Group for Indigenous Affairs, IWGIA Doc. No. 85, 1997).

Thornberry, P., “Self-Determination and Indigenous Peoples: Objections and Responses” in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Abo Akademi University, Institute for Human Rights, 2000).

Tunkin, G., “A New Political Thinking and International Law” in R. P. Dhokalia & R.S. Pathak, *International Law in Transition – Essays in Memory of Judge Nagendra Singh* (Dordrecht:: Martinus Nijhoff Publishers, 1992).

van Hoof, G.J.H., *Rethinking the Sources of International Law* (London: Kluwer Law and Taxation Publishers, 1983).

Venne, S., *Our Elders Understand Our Rights – Evolving International Law Regarding Indigenous Peoples* (Penticton: Theytus Books, 1998).

United Nations, *Earth Summit: Convention on Biological Diversity: final text* (Paris: Dept. of Public Info., 1992).

White, R., “Self-Determination: Time for a Re-Assessment?” in R. McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000).

Williams, S., *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, NY: Oceana Publications, 1978).

WIPO, *WIPO Intellectual Property Handbook: Policy, Law and Use* (Geneva: WIPO, Publication No. 489, 2001).

WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (Geneva: WIPO, April 2001).

Woodroffe, J., "Regulating Multinational Corporations in a World of Nation States" in M. Addo, ed., *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999).

The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

Wurm, S., ed., *Atlas of the World's Languages in Danger of Disappearing* (Paris: UNESCO Publishing, 1996).

SECONDARY MATERIALS: ARTICLES

Bright, C., "Who Owns Indigenous Peoples' DNA?" (Jan/Feb 1995) 55 *The Humanist* at 44.

Ching, K., "Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm" (1997) 66 *Fordham Law Review* at 688.

Churchill, I. J., "Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things" (July 1994) 8 *I.P.J.* 249-284.

Clements, R., "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (Winter 1991) 49 *University of Toronto Faculty Law Review* at 21.

Corntassel, J. J. and T. H. Primeau, "Indigenous 'Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination'" (1995) 17 *Human Rights Quarterly* at 344-345.

Crespi, S., "Biotechnology Patenting: the Wicked Animal Must Defend Itself" (1995) 9 *E.I.P.R.* 431-441.

Dembo, D., C. Dias & W. Morehouse, "Biotechnology and The Third World: Some Social, Economic, Political and Legal Impacts and Concerns" (1988) 11 *Rutgers Computer & Technology Law Journal* at 436-437.

Derzko, N. M., "Protecting Genetic Sequences under the Canadian *Copyright Act*" (December 1993) 8 *I.P.J.* 54-56.

Faulstich, P., "Hawaii's Rainforest Crunch: Land, People and Geothermal Development" (1990) 14:4 *Cultural Survival Quarterly* 43.

Flores, M., F. Valentine & G. Nabham, "Managing Cultural Resources in Sonoran Desert Biosphere Reserves" (1990) 14:4 *Cultural Survival Quarterly* 27.

Gault-Williams, M., "Strangers in their Own Land" (1990) 14:4 *Cultural Survival Quarterly* 43.

Graham, G. M., "Protection and Reversion of Cultural Property: Issues of Definition and Justification" (1987) 21 *Int'l Law* at 756.

Harry, D., "Patenting of Life and Its Implications For Indigenous Peoples" (January 1995) *IPF Info Sheet* #7.

Henderson, J. S., "Mikmaq Tenure in Atlantic Canada" (1995) 18:2 *Dalhousie Law Journal* 196.

Hoffmaster, B., "Between the Sacred and Profane: Bodies, Property, and Patents in the *Moore Case*" (December 1991) 7 *I.P.J.* 114-148.

Horton, C., "Protecting Biodiversity & Cultural Diversity Under Intellectual Property Law: Toward a New International System" (1995) 10 *J. Env'tl. Law & Litigation* 7.

"International NGO Conference on Discrimination Against Indigenous Peoples in the Americas - 1977" (1977) 3 *American Indian Journal of the Institute for the Development of Indian Law* at 4-5.

Johnson, T., "From rainforest to medicine chest: natural riches up for grabs" *Miami Herald* (12 June 1992) 1A.

Lobo, S., "The Fabric of Life" (Summer 1991) 15:3 *Cultural Survival Quarterly* at 42.

Morris, C., "Indigenous intellectual property rights: the responsibilities of maintaining the oldest continuous culture in the world" (May 1997) 4:2 *Indigenous Law Bulletin* at 9.

Pask, A., "Culturally Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture" (Dec 1993) 8 *I.P.J.* 61.

Ridgen, P., "Companies covet genes" (Summer 1997) 23:3 *Alternatives Journal* at 8.

Rose, M., "Highest court rules against Aborigines" *The Globe and Mail* (02 April 1998) A9.

Sanders, D., "Draft Declaration on the Rights of Indigenous Peoples - Commentaries" [1994] 1 *C.N.L.R.* at 48.

Venkatesan, D., "Ecocide or Genocide? The Onge in the Andaman Islands" (1990) 14:4 *Cultural Survival Quarterly* 43.

Williams, Jr., R. A., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) 660 *Duke Law Journal* at 665.

Zaman, M.Q., "Land Acquisition and Compensation in Involuntary Resettlement" (1990) 14:4 *Cultural Survival Quarterly* at 43.

SECONDARY MATERIALS: CONFERENCE, UNPUBLISHED AND ON-LINE MATERIALS

Article 8(j): Traditional Knowledge, Innovations and Practices - Introduction, online: *Convention on Biological Diversity*
<<http://www.biodiv.org/programmes/socio-eco/traditional/default.asp#>>
(last modified: 4 April 2002).

Conventions and Agreements of a Standard-Setting Nature adopted under the auspices of UNESCO solely or jointly with other International Organizations, online: UNESCO <<http://www.unesco.org/general/eng/legal/convent.shtml>>(last modified: 15 March 2002).

Daes, Dr. Erica-Irene A., "Keynote Address - Defending Indigenous Peoples' Heritage" (Protecting Knowledge - Traditional Resource rights in the New Millennium, Union of BC Indian Chiefs, Vancouver, BC, Canada, 23 -26 February), online: Union of British Columbia Indian Chiefs, <<http://www.ubcic.bc.ca/protect.htm>> (last modified: 19 February 2002).

Davis, M., Biological Diversity and Indigenous Knowledge, Research Paper 17 1997-98, online: Parliament of Australia Parliamentary Library <<http://www.aph.gov/au/library/pubs/rp/1997-98rp17.htm>> (last modified: 27 September 2001).

Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project (Phoenix, Arizona, 19 February 1995), online: Alaska Native Knowledge Network <<http://www.ankn.uaf.edu/declaration.html>>(date accessed: 22 September 2001).

Declaration of the Consultation Meeting Indigenous Peoples, Mother Earth and Spirituality (San Jose, Costa Rica, 31 May 1996), online: The Earth Charter Initiative, International Secretariat, The Earth Council <http://www.earthcharter.org/report/special/indigenous_en.htm> (date accessed: 22 September 2001).

Earth Council, *Declaration of the Consultation Meeting Indigenous Peoples, Mother Earth and Spirituality* (San Jose, Costa Rica, 31 May 1996), online: The Earth Charter Initiative, International Secretariat, The Earth Council <http://www.earthcharter.org/report/special/indigenous_en.htm> (date accessed: 22 September 2001).

First Mtg. of the Ad Hoc Open-Ended Inter-Sessional Working Group on Art. 8(j), 27 - 31 March 2000 - Seville, Spain, online: Convention on Biological Diversity <<http://www.biodiv.org/doc/meeting.asp?wg=WG8J-01&thm=ART>> (last modified: 19 March 2002).

Indigenous Peoples' Seattle Declaration (Third Ministerial Meeting of the World Trade Organization, Seattle, Washington State, USA, 30 November - 3

December 1999); online: Corpwatch
<<http://www.corpwatch.org/trac/corner/worldnews/other/527.html>> (date
accessed: 22 September 2001).

*Intergovernmental Committee on Intellectual Property and Genetic Resources,
Traditional Knowledge and Folklore (First Session)*, (Geneva, 30 April to 3 May,
2001), online: World Intellectual Property Organization
<<http://www.wipo.int/eng/meetings/2001/igc/document.htm>> (date
accessed: 24 September 2001).

*Intergovernmental Committee on Intellectual Property and Genetic Resources,
Traditional Knowledge and Folklore (Second Session)*, (Geneva, 10 December to 14
December, 2001) online: World Intellectual Property Organization
<http://www.wipo.int/eng/meetings/2001/igc/document_2.htm> (date
accessed: 26 July 2002).

*Intergovernmental Committee on Intellectual Property and Genetic Resources,
Traditional Knowledge and Folklore (Third Session)*, (Geneva, 13 June to 21 June,
2002), online: World Intellectual Property Organization
<http://www.wipo.int/eng/meetings/2002/igc/index_3.htm> (date
accessed: 26 July 2002).

King, C., *Here come the Anthros - Paper presented at the 88th Annual Meeting of the
American Anthropological Association* (Washington, D.C.).

Latin American Declaration on Transgenic Organisms (Quito, Ecuador,
January 1999), online: GENET, The European NGO Network on Genetic
Engineering <<http://www.gene.ch/info4action/1999/Feb/msg00031.html>>
(date accessed: 22 September 2001).

Permanent Forum on Indigenous Issues, online, UN, Office of the High
Commissioner for Human Rights
<<http://www.unhchr.ch/indigenous/forum.htm>> (date accessed: May 26,
2002).

Posey, D., "Mind the Gaps: Identifying Commonalities and Divergencies
between Indigenous Peoples and Farmers Group" (Protecting Knowledge -
Traditional Resource Rights in the New Millennium, Vancouver, British
Columbia, Canada, 23-26 February, 2000), online: Union of BC Indian Chiefs
<<http://www.ubcic.bc.ca/protect.htm>> (date accessed: 2 May 2000).

Posey, D.A., "The 'Balance Sheet' and the 'Sacred Balance:' Valuing the Knowledge of Indigenous and Traditional Peoples" (Protecting Knowledge – Traditional Resource Rights in the New Millennium, Vancouver, British Columbia, Canada, 23 –26 February, 2000), online: Union of BC Indian Chiefs <<http://www.ubcic.bc.ca/protect.htm>> (date accessed: 2 May 2000).

United Nations, *World Population Prospects: The 2000 Revision* at 5, online: UN, Population Division of the Department of Economic and Social Affairs of the UN Secretariat <<http://www.un.org/esa/population/publications/wpp2000/wpp2000h.pdf>> (date accessed: 27 May 2002).

United Nations Environment Programme, *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, online, UNEP <<http://www.biodiv.org/biosafety/protocol.asp>> (last modified: 29 October 2001).

WIPO, *2000-2001 Program and Budget*, online: World Intellectual Property Organization <http://www.wipo.int/about-wipo/en/index.html?wipo_content_frame=budget.html> (date accessed: 24 September 2001).

WIPO, *Main Program 11*, online: World Intellectual Property Organization <http://www.wipo.int/eng/document/govbody/wo_gb_ab/prg11.htm> (date accessed June 10 2000).

WIPO, *Program and Budget of WIPO: 1998-1999*, online: World Intellectual Property Organization <http://www.wipo.int/eng/document/govbody/wo_gb_ab/budget.htm> (date accessed: 10 June 2000).

WIPO, *Program and Budget of WIPO: 2002-2003* at par. 153, online: World Intellectual Property Organization <<http://www.wipo.int/about-wipo/en/index.html>> (date accessed: 26 July 2002).

World Trade Organization, *Environment: Trade and Environment News Bulletin, TE/004 – 14 August 1995*, online, World Trade Organization <http://www.wto.org/english/tratop_e/envir_e/te004_e.htm> (date accessed: 24 February 2002).

APPENDIX 1

Survey of statements, declarations, charters, resolutions and recommendations by indigenous and other non-governmental organizations on indigenous heritage and knowledge

1984

Declaration of Principles of the World Council of Indigenous Peoples, in Posey, D.A. and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, Appendix 3 (Ottawa, ON: International Development Research Centre, 1996).

1990

Resolutions of the Women's Commission, First Continental Conference of Indigenous Peoples on 500 Years of Resistance (Quito, Ecuador, July 1990), online: Mountain Forum
<<http://www.mtnforum.org/resources/library/fccip90a.htm>>(date accessed: 22 September 2001).

1992

Kari-Oca Declaration and the Indigenous Peoples' Earth Charter (World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca, Brazil, 25-30 May 1992), in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

Charter of the Indigenous Tribal Peoples of the Tropical Forests (Penang, Malaysia, 15 February 1992), in *Indigenous Peoples, Forests, and Biodiversity – Indigenous Peoples and the Global Environmental Agenda* (Chadlington, Eng.: International Alliance of Indigenous-Tribal Peoples of the Tropical Forests & International Work Group for Indigenous Affairs, 1996).

Statement of Indigenous Nations, Peoples and Organizations (New York, 9 December 1992), online: Nativenet
<<http://www.native.urthscsa.edu/ararchive/nl/9307/0194.html>>(date accessed: 22 September 2001).

1993

UN Draft Declaration on the Rights of Indigenous Peoples, in D. A. Posey and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), Appendix 4.

Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (Whakatane, Aotearoa/New Zealand, 2-8 June 1993), in Posey, D.A. and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa, ON: International Development Research Centre, 1996).

Recommendations from the Conference “Voices of the Earth: Indigenous Peoples, New partners and the Right to Self-Determination in Practice” (Amsterdam, Netherlands, 10-11 November 1993), in D. A. Posey and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), Appendix 8.

The Julayinbul Statement on Indigenous Intellectual Property rights and Declaration Reaffirming the Self-Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area (Jingarrba/Daintree, Australia, 25-27 November 1993), online: Indigenous Cultural and Intellectual Property Rights <<http://www.icip.lawnet.com.au/info6.htm>>(date accessed: 22 September 2001).

1994

Declaration of the International Meeting Around the First World Gathering of Elders and Wise Persons of Diverse Indigenous Traditions (Amautic Janajpacha Community, Cochabamba, Bolivia, 1-11 August 1994).

Statement from the Regional Meeting sponsored by COICA and UNDP on “Intellectual Property Rights and Biodiversity” (Santa Cruz de la Sierra, Bolivia, 28-30 September 1994), in Posey, D.A. and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), Appendix 9.

Oka Declaration on a Sustainable Future for the Environment and Traditional Peoples of the Okinsky Territory (Okinsky Territory, Siberia, September 1994).

The Temuco-Wallmapuche Declaration, Mapuche Nations organization Aukin Wallmapu Ngulam (Consejo de Todas las Tierras) Conference in November 1994 in Chile, evaluating indigenous responses of the consequences of the regional North American Free Trade Agreement. Indigenous peoples from Chile, Argentina, Peru and Mexico adopted a declaration condemning the accelerated usurpation and patenting of indigenous peoples' knowledge by transnational corporations.

1995

Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project (Phoenix, Arizona, 19 February 1995), online: Alaska Native Knowledge Network
<<http://www.ankn.uaf.edu/declaration.html>>(date accessed: 22 September 2001).

Statement from the "Asian Consultation on the Protection and Conservation of Indigenous Knowledge" (TVRC Tambunan, Sabah, East Malaysia, 24-27 February 1995), in Posey, D.A. and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), Appendix 10.

Final Statement from the "Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights" (Suva Regional Meeting of Indigenous Peoples' Representatives on the Conservation and Protection of Indigenous Peoples' Knowledge Systems, Pacific Concerns Resource Center, Suva, Fiji, April 1995), in Posey, D.A. and G. Dutfield, *Beyond Intellectual Property – Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), Appendix 11.

Treaty for a Lifeforms Patent-Free Pacific and Related Protocols (Suva, Fiji, April 1995).

Principles and Guidelines, Protection of the heritage of indigenous people, Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, Doc. E/CN.4/Sub.2/1995/26 (21 June 1995), online: UN
<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c6646bc7fe89406f802566c0005cd3f0?Opendocument>>(date accessed: 16 February 2002).

Beijing Declaration of Indigenous Women (UN Fourth World Conference on Women, Huairou, Beijing, Peoples Republic of China, 30 August – 8 September 1995), online: Indigenous Peoples Council on Biocolonialism

<<http://www.ipcb.org/resolutions/beijingdec.html>>(date accessed: 22 September 2001).

Indigenous Peoples' Statement on Access and Benefit-sharing and Intellectual Property Rights (Indigenous Peoples' Biodiversity Network, Jakarta, Indonesia, 10 November 1995), online: (Document UNEP/DBC/COP/2/3).

1996

The Chiapas Declaration, 1 January 1996, Mexico, online: Nativenet <<http://nativenet.uthscsa.edu/archivenl/9601/0056.html>>(date accessed: 22 September 2001).

Statement from Indigenous peoples participating at the Fourth Session of the Commission on Sustainable Development (CSD-4), New York, 18 April - 3 May 1996.

Declaration of the Consultation Meeting Indigenous Peoples, Mother Earth and Spirituality (San Jose, Costa Rica, 31 May 1996), online: The Earth Charter Initiative, International Secretariat, The Earth Council <http://www.earthcharter.org/report/special/indigenous_en.htm>(date accessed: 22 September 2001).

Peoples' Plan of Action on Agriculture, Food Security and Farmers' Rights (Statement from 3-day meeting before the FAO 4th ITC, Leipzig, Germany, June 1996); online: Working Group on Traditional Resource Rights <<http://users.ox.ac.uk/~wgtrr/safehands.htm>>(date accessed: 22 September 2001).

Saskatoon Declaration of Indigenous Cultural Restoration and Policy Recommendations on Cultural Restoration Developed at the Saskatoon Summer Institute (July 8, 1996, Saskatoon, Saskatchewan, Canada), 1996 International Summer Institute, Social Sciences and Humanities Research Council, in Battiste, M., ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000), Appendix 2.

Leticia Declaration and Proposals for Action with regard to the Management, Conservation and Sustainable Development of all Types of Forests (Leticia, Colombia, 13 December 1993), online: International Alliance of the Indigenous-Tribal Peoples of the Tropical Forests <<http://www.gn.apc.org/iaip/let/report.htm#declaration>>(date accessed: 22 September 2001).

1997

Charter of "Farmers Rights" (Issued at the Convention of Farmers, Bangalore, Karnataka, India, 30 January 1997).

Consultation on Wildlife Conservation and Peoples' Livelihood Rights: Building Bridge – Joint Statement (Meeting at Bhikampur-Kishori, Alwar District, Rajasthan, India, April 1997), online: Working Group on Traditional Resource Rights <<http://users.ox.ac.uk/~wgtrr/alwar.htm>> (date accessed: 22 September 2001).

Statement from the International Workshop on Indigenous Peoples and Development (Ollantaytambo, Peru, 21-26 April 1997), online: Working Group on Traditional Resource Rights <<http://users.ox.ac.uk/~wgtrr/ollan.htm>> (date accessed: 22 September 2001).

Ukupseni Kuna Yala Declaration/The Kuna Yala Statement: Indigenous Peoples and the Convention on Biological Diversity – Implementing Article 8(j) (Cultural Survival Canada Workshop, Uichubuala, Kuna Yala, Panama, 30 April – 2 May 1997).

The "Heart of the Peoples" Declaration (North American Indigenous Peoples Summit on Biological Diversity and Biological Ethics, Fort Belknap Reservation, Montana, USA, 7 August 1997), online: Indigenous Peoples Council on Biocolonialism <<http://www.ipcb.org/resolutions/ienres.html>> (date accessed: 22 September 2001).

The Jamberoo Declaration of Indigenous Cultural Heritage Knowledge and Pathways, (Adopted by Plenary of Conference 1997 Knowledge and Learning Circle of Indigenous Intellectual Property Rights and Freedoms, Jamberoo, New South Wales, Australia, 13-17 October 1997), online: Jumbunna CAISER 1997 Knowledge and Learning Circle <<http://www.usask.ca/nativelaw/CAISER.html>> (last modified: 7 June 1999).

1999

Latin American Declaration on Transgenic Organisms (Quito, Ecuador, January 1999), online: GENET, The European NGO Network on Genetic Engineering <<http://www.gene.ch/info4action/1999/Feb/msg00031.html>> (date accessed: 22 September 2001).

Declaration on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands (Adopted by the UNESCO/Council of Pacific Arts Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands, Secretariat of the Pacific Community, New Calendonia, 15-19 February 1999), online: UNESCO <http://www.unesco.org/culture/copyright/folklore/html_eng/declaration.shtml>(date accessed: 22 September 2001).

Conclusions and Recommendations from the International Conference on Indigenous and Scientific Knowledge on the Sustainable Use of Plants (20th Anniversary of doCip, Geneva, 8 - 10 October, 1999).

Cultural Challenges of the International Decade of the World's Indigenous People: Indigenous/Tribal Peoples, Recommendations to UNESCO (30th General Conference of UNESCO, Paris, 30 October 1999), online: UNESCO <<http://www.unescocat.org/indigang.html>> (date accessed: 22 September 2001).

Indigenous Peoples' Caucus Statement at WIPO (Presented at the "Roundtable on Intellectual Property and Traditional Knowledge," WIPO, Geneva, 2 November 1999); online: Indigenous Environmental Network <http://www.ieneearth.org/world_trade_org.html>(date accessed: 22 September 2001).

Geneva Declaration on the Health and Survival of Indigenous Peoples (International Consultation on the Health of Indigenous Peoples, WHO, Geneva, 23-26 November 1999); online: Health site <http://www.healthsite.co.nz/hauro_maori/resources/feature/0001/002.htm> (date accessed: 22 September 2001).

Indigenous Peoples' Seattle Declaration (Third Ministerial Meeting of the World Trade Organization, Seattle, Washington State, USA, 30 November - 3 December 1999); online: Corpwatch <<http://www.corpwatch.org/trac/corner/worldnews/other/527.html>>(date accessed: 22 September 2001).

2000

Olowali Declaration (International Women's Day Conference, March 2000), online: Assembly of First Nations <http://www.afn.ca/Programs/Employment%20Equiity/olowaili_declaration.htm> (date accessed: 22 September 2001).

Declaration of the First International Forum of Indigenous Peoples on Climate Change, UN Framework Convention on Climate Change Subsidiary bodies meetings, Lyon, France, September 4-6, 2000, online: International Indian Treaty Council <http://www.treatycouncil.org/new_page_5211.htm>(date accessed: 25 February, 2002).

Submission to the World Heritage Committee from a Forum of Indigenous Peoples assembled in Cairns, Australia, 24 November 2000(24th Annual Session of the World Heritage Committee, Cairns, Australia, 27 November – 2 December 2000).

2001

Protecting Indigenous "Intellectual Property,Draft Discussion Text" Indigenous Peoples Summit of the Americas, March 28-31, 2001, Ottawa, ON, Canada (unpublished).

Declaration of the Indigenous Peoples' Summit of the Americas, March 28-31, 2001, Ottawa, ON, Canada (unpublished).

The Bonn Declaration, Third International Forum of Indigenous Peoples and Local Communities on Climate Change, July 14 15, 2001, Bonn, Germany, online: International Indian Treaty Council <http://www.treatycouncil.org/new_page_5212.htm>(date accessed: 25 February 2002).